

OPINIONS
OF THE
"Corporation Counsel and
Assistants

FROM

MAY 1, 1915, TO JUNE 30, 1916.

PUBLISHED BY AUTHORITY OF THE
CITY COUNCIL
OF THE CITY OF CHICAGO

Compiled and Edited by
SAMUEL A. ETTELSON
Corporation Counsel



PREFACE

In pursuance of the usual custom, I am publishing a number of selected opinions of the corporation counsel and assistants, at the close of the administration during which they were written. This has been the practice for many years, so that the complete set of such printed opinions covers a wide range of subjects, and cannot fail to be of great value to the Law Department of this and other municipalities as well as to the general practitioner.

The printed opinions covering the administration of Hon. William Hale Thompson are contained in three volumes, of which the one in which this preface appears is the first. There were several times as many opinions rendered during the eight years of that period as appear in these books, and it was necessary to drop out many that would have been found interesting and instructive, in order to avoid making the publication too voluminous.

The selection of the opinions to be printed was made in accordance with a well-defined plan, the intention being to print only such as treat of live subjects or as make records of the results of painstaking research. Those which are obsolete by reason of a change in laws or conditions, or by reason of adverse decisions, or for any other reason, were discarded. It is worthy of note that the number dropped on account of the courts holding contrary to the opinion is so small as to be almost negligible. In one or two instances such decision was made by a divided court, as in the School Board case. Notwithstanding the adverse decision in that case, the opinion of the Law Department is published herein, because it contains a complete brief on the subject covered by it.

Following out this plan, the large number of opinions covering the liquor laws were omitted, such opinions including questions concerning the issuance of licenses to dram-shops, questions of frontage consents, entertainments in dram shops, Sunday closing and kindred subjects. Many of these opinions were very carefully prepared and abundantly supported by authority, but the only one retained and printed herein is that prepared for the the mayor with respect to his duty concerning the closing of dramshops on Sundays, which will be found useful on other questions along the line of Sunday closing.

There were also omitted all those opinions which were no longer of value on account of the changes in school laws, pension laws, public utility regulation laws, etc. In some instances there were points raised and decided under the repealed or altered laws which were similar to questions that might come up under the new laws, or that might come up in other matters. In those cases the opinions are printed although at first blush they may seem out of date.

It is not always the lengthy opinion or the one containing a great number of citations that is of most value. Many very short opinions that pass on points which have not been decided by the courts will be found helpful. Others which contain historical facts or data gathered from records, that must be again looked up if not preserved, are printed for the purpose of making such information readily accessible. The immediate work of selection was in charge of Assistant Corporation Counsel Leon Hornstein, Carl J. Appell and Ruth C. Nelson.

It is to be regretted that the opinions rendered during the administration of Hon. Edward F. Dunne, when Hon. James Hamilton Lewis was corporation counsel, have never been published. It would serve a useful purpose to have them printed, so that the research into many municipal problems made during that period may not be lost. If that is

done at a later date, a complete index covering all printed opinions from January 1, 1872, to the present time could be compiled, and the value of these publications would thereby be greatly enhanced.

I am convinced that the compilation contained in these books, supplementing the printed opinions of the distinguished men who have preceded me, will do much to lighten the work of the members of the bar and will be of great assistance to those employed in the Law Department of the City of Chicago.

SAMUEL A. ETTELSON,
Corporation Counsel.

Chicago, April 16, 1923.

BARNARD & MILLER

PRINTERS
170 1 & N LA SALLE STREET
Chicago

OPINIONS
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FROM

MAY 1, 1915, TO JUNE 30, 1916.

Annexation of the Village of Clearing.

May 1, 1915.

TO THE HONORABLE, THE CITY COUNCIL
OF THE CITY OF CHICAGO.

Gentlemen:

We beg to inform you that the proposition for the annexation of the Village of Clearing, having received the votes of the majority of those who voted upon the question in both the City of Chicago and the Village of Clearing, was duly carried, and that, upon the counting of the votes and the announcement of the result, the annexation of said Village of Clearing to the City of Chicago became effective. Such count for the City of Chicago was made shortly after the municipal election in this city, and for the Village of Clearing was completed by the canvassing board of said village April 24, 1915. Hence, under the law, the said village was annexed to the city on the last mentioned date.

We submit herewith certified copy of the returns of the canvassing boards and a certified copy of the order of the county court based thereon, for the purpose of preserving same in the records of the city clerk's office, together with this letter, so that the date of such annexation, April 24, 1915, may become a matter of record.

The fiscal year of the Village of Clearing, under its

ordinances, began May 1st of each year; consequently there was no appropriation ordinance passed for the current year, and no separate tax levy can be made for the territory formerly included within the boundaries of said village. The county clerk has, however, been notified that the tax levy of the City of Chicago should be spread over this territory.

The statute provides that all public books, papers and documents of the village shall be transferred to and filed with the appropriate officer of the city as the city council shall direct. While we believe there is sufficient authority given by the code for the city comptroller to demand and take over all such public documents, we have deemed it advisable, in order that no question may be raised by anyone connected with the former Village of Clearing, to submit herewith an order naming the city comptroller as the officer to whom such transfer should be made, and we recommend that such order be passed without delay, so that the comptroller can proceed at once to take over the property and public documents.

We also beg to call your attention, in this connection, to the fact that it is necessary to incorporate the annexed territory within the boundaries of one or more of the wards of the city, and suggest that this matter be referred to the appropriate committee for consideration.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,
Corporation Counsel.

Annexation of Territory in Caldwell's Reservation.

May 3, 1915.

Hon. Oliver L. Watson, Alderman, Twenty-seventh Ward.

Dear Sir:

On March 1, 1915 (see Council Journal, pp. 3787-8),

the City Council passed a resolution providing that the question of the annexation of certain unincorporated territory therein mentioned be submitted to the vote of the people of the City of Chicago at the municipal election April 6, 1915. The said territory is described as follows:

“All of those parts of Section 31, in Township 41 North, Range 13 East of the Third (3d) Principal Meridian, beginning at the Northwest Corner of Caldwell’s Reservation, in the Southeast Quarter of Section 31 aforesaid, running thence South 58 degrees 30 minutes West, Five and twenty-one one-hundredths chains (5.21/100 ch.); thence South along the quarter section line, Twelve and fifty one-hundredths chains (12.50/100 ch.); thence East along the Town line Eight and thirty-three one-hundredths chains (8.33/100 ch.); thence North Five and fifty one-hundredths chains (5.50/100 ch.); thence North 57 degrees 30 minutes East, Five and forty-seven one-hundredths chains (5.47/100 ch.) to the center of the plank road; thence North 33 degrees 30 minutes West, along the center of said road, Three and sixty one-hundredths chains (3.60/100 ch.) to the reservation line; thence North 57 degrees 30 minutes West, Seven and nineteen one-hundredths chains (7.19/100 ch.) to the place of beginning, containing Thirteen and three quarters acres more or less, situated in the County of Cook and State of Illinois.”

The question of the annexation of this territory was submitted to vote at said election, and a majority of all the votes cast were in favor of the proposition for annexation, as will appear from the certificate of the chief clerk of the Board of Election Commissioners of the City of Chicago which is forwarded herewith.

It appears that all the preliminaries required by law in such cases have been duly complied with in this instance and it now becomes the duty of the City Council to annex said territory by ordinance.

The provision of the statute relating to the subsequent procedure on the part of the City Council reads as follows:

“In case the question of such annexation shall receive a majority of all the votes cast at said election in favor thereof, the city council or board of trustees of said city, village or town (as the case may be), shall,

within ninety days thereof, by ordinance, annex such territory to such city, village or town, upon filing a copy of such ordinance, with an accurate map of the territory annexed (duly certified by the mayor of the city or president of the board of trustees of the village or town), in the office of the recorder of deeds in the county where the annexed territory is situated, and having the same recorded therein.”

You will observe that while the statute is mandatory, the passage of an ordinance is a necessary formality. It was probably the intention of the legislature that the City Council should be placed in a position to decide whether everything required by law had been complied with before it sanctioned the annexation.

We have therefore prepared draft of an ordinance annexing the said territory and directing the city clerk to file a copy of same with the map of the territory annexed duly certified in the office of the Recorder of Deeds of Cook County, and transmit said draft herewith.

We recommend that you present the certificate of the chief clerk of the election commissioners to the City Council and ask that the same be received and filed in the office of the city clerk, and that you thereupon present the ordinance. This will do away with the necessity of incorporating the certificate in the ordinance.

Owing to the peculiar wording of the statute we deem it advisable that the plat attached to the ordinance, should be signed by the mayor, as well as the ordinance itself.

We further recommend that the signature of the mayor on the plat be placed thereon before the final passage of the ordinance, since the plat is made a part of the ordinance. The complex description and irregular shape of the territory makes such a procedure the only safe one.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,
Corporation Counsel.

**Bond of City Treasurer as Treasurer of the Firemen's
Pension Fund.**

May 3, 1915.

HON. JOHN SIMAN, Secretary of the Board of Trustees of the
Firemen's Pension Fund.

Dear Sir:

We acknowledge receipt of your communication of April 30th to this department requesting an opinion as to whether or not the city treasurer is required to furnish an additional bond on account of being treasurer of the firemen's pension fund.

Section 1 of the Act creating said board makes the treasurer of the city *ex officio* treasurer of this fund. (Paragraph 403, Chapter 24, Hurd's Revised Statutes of Illinois.) The legal definition of *ex officio* is by virtue of his office.

Section 4 of Article VI of the Cities and Villages Act prescribes that the city treasurer shall file a bond for the faithful performance of his duty, in such penal sum as may be by resolution or ordinance directed, with a proviso that the treasurer's bond shall not be fixed at a sum less than the amount of the estimated tax and special assessments for the current year.

Section 12 of the Firemen's Pension Fund Act prescribes that "the treasurer shall * * * execute a bond to the city, village or incorporated town, with good and sufficient securities, in such penal sum as the board shall direct, to be approved by the board, conditioned for the faithful performance of the duties of his office. * * * Such bond shall be filed in the office of the clerk of such city * * * and in case of a breach of the same, or the conditions thereof, suit may be brought on the same in the name of such city * * * for the use of said board, or of any person or persons injured by such breach."

Under the law as above stated, we are of the opinion that the city treasurer is required to furnish an additional bond in an amount to be fixed by your board, first, because the original bond of the city treasurer is based upon other

conditions than as treasurer of this pension fund, and secondly, because the act itself specifically prescribes a bond to be regulated by the board of trustees of the firemen's pension fund. In enforcing statutes, it becomes incumbent to enforce each section and part thereof, unless a very apparent reason exists for not so doing.

Yours very truly,

M. W. CAGNEY,
Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,
Corporation Counsel.

Permit for Paving Right-of-Way of Street Railway Line.

May 4, 1915.

HON. W. R. MOORHOUSE, Commissioner of Public Works.

Dear Sir:

In your communication of the 1st inst., you ask the following question:

Can I legally grant the permit to the Chicago Surface Lines to do this?

The work to be done is to pave the right of way of the Chicago Railways Company in 26th street, from Springfield avenue to Kedzie avenue, with creosoted block, except a line of granite blocks on both sides of each rail.

The agency known as Chicago Surface Lines is operating the existing street railways under an ordinance passed November 13, 1913. It is neither the lessee, successor nor assignee of the Chicago Railways Company, but merely the agency mutually agreed upon to operate a unified service under the ordinance mentioned.

Under "Exhibit B" of the Chicago Railways Company ordinance of February 11, 1907, sub-title "Pavement" (Council Journal, 3178), it is provided:

"The Company, upon the order of the Commissioner of Public Works, and the approval of the Board of Supervising Engineers, shall pave, repave, or repair

the portions of the streets and public ways which by this grant it is required to keep paved and in repair, etc.”

“Exhibit A” of said ordinance (Council Journal, 3173) names, among other streets, 26th street from Western avenue to 40th avenue.

It is therefore evident that the permit in question must be issued to the Chicago Railways Company.

Very truly yours,

NICHOLAS MICHELS,

Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,

Corporation Counsel.

Eligibility for Reinstatement of Resigned Firemen.

May 5, 1915.

HON. THOMAS O'CONNOR, Fire Marshal.

Dear Sir:

Your favor of May 3d, requesting an opinion as to whether Henry F. Weydert, Michael Noon and Charles R. Potthoff, captains in your department, retired at their own request and recently reinstated in the active service with the consent of the Civil Service Commission, are ineligible for reinstatement, owing to the fact that they tendered their resignations to the fire marshal at the time of their leaving the service and failed to comply with the civil service rules to make application for the withdrawal of their resignations within the prescribed thirty days, received.

The unconditional resignation of an officer which is accepted by the proper authority leaves the office vacant. This resignation cannot be withdrawn, even with the consent of the authority which accepted it. A new appointment or election is necessary in order for such person to resume the office as a *de jure* officer.

Bunting v. Willis, 27 Grat. Va. 144.

Bishop v. State, ex rel., 149 Ind. 223.

State, ex rel. v. Bus, 135 Mo. 325.

The Supreme Court of this state has repeatedly held that when one claims the rights of an officer by virtue of his office or position, such as the right to salary, etc., it must appear that the office or position legally exists and that he is lawfully entitled to hold the same and exercise the duties and powers thereof, *de jure* as distinguished from *de facto*.

Bullis v. City of Chicago, 235 Ill. 472.

Moon v. The Mayor, 214 Ill. 40.

Stott v. City of Chicago, 205 Ill. 281.

Prior to January 27, 1913, a rule of the Civil Service Commission provided that a resignation could be withdrawn and cancelled any time within 30 days after it was filed. This rule of the Civil Service Commission was then modified so that where a resignation was for the purpose of accepting the benefits of any pension fund, owing to disability, and thereafter the removal of such disability should be shown to the satisfaction of the commission, the commission might permit the withdrawal of such resignation and its cancellation at any time after it was filed, providing that this purpose should be so stated in the resignation.

The resignation of Michael Noon was filed June 23, 1912, before the said modification of the rule concerning resignations took effect. The resignations of Henry Weydert and Charles R. Potthoff were filed respectively on February 26, 1913 and March 20, 1914, and no statement was made in these resignations that their purpose was for coming within the disability feature of the pension law. In fact, the applications of these two persons for pensions were made on the grounds that they had served twenty-two years in the department.

None of these resignations, therefore, come within this saving clause of the rule of the Civil Service Commission governing cases of resignations for the purpose of coming within the disability feature of the pension law, and were, therefore, unconditionally accepted 30 days after they had been filed with the fire marshal. The acceptance of these resignations is proved by the fact that these persons have been on the pension list, if any further proof is necessary.

As soon as these officers' unconditional resignations were accepted by the city, the offices or positions which they held became vacant. A new appointment on a new certification after another competitive examination in accordance with the provisions of the Civil Service Act and the rules of the Civil Service Commission is necessary in order to make them officers *de jure*, so as to permit them to exercise the duties and draw the salaries of their former offices or positions.

We therefore advise you that, in our opinion, unless these three captains have been appointed on a new certification after another competitive examination in accordance with the Civil Service Act and the rules of the Civil Service Commission, they are not legally in the service of the city and should not be carried on its payroll.

Yours very truly,

JOHN E. FOSTER,

Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,

Corporation Counsel.

Permit Fee for Trailer.

May 3, 1915.

HON. CHARLES J. FORSBERG, City Collector.

Dear Sir:

Your request of the 3rd inst., for an opinion as to the amount of the tax to be charged for the issuance of a permit for the use of trailers such as are described on the circular attached to your communication, is at hand.

In reply thereto I direct your attention to section 2717 of The Chicago Code of 1911, which makes it unlawful to use any vehicle, excepting street cars on metallic rails, unless the same be licensed as thereafter provided. Section 2718 provides for the filing of an application with you for a license to use such vehicles, and Section 2719, as amended March 4, 1912, designates the license fees to be paid annually to you for various classes of vehicles, none of which cover the type

of vehicle concerning which you seek information in your letter to us.

Under the ordinance, therefore, a license must be procured in order to use this kind of vehicle, which license must be issued upon the filing of an application setting forth the facts required by Section 2718. No license fee can be charged as none is provided for.

If such vehicles are to be used in Chicago the attention of the City Council should be called to this fact, so that a license fee may be provided for if it is deemed advisable to require the same.

A further question is presented by your communication as to the amount of the license fee for motor vehicles to which trailers are attached, and the answer to this question will depend upon a determination of this question, namely, whether such trailers are to be used for commercial purposes. If the trailers are to be used for commercial purposes the license fee for the motor vehicles to which the same are attached will be \$30.00, but if the trailers are not to be used for commercial purposes the license fee will depend upon the class of motor vehicle to which such trailers are attached.

Very truly yours,

LORING R. HOOVER,

Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,

Corporation Counsel.

Vehicles Used for Commercial Purposes Defined.

May 6, 1915.

HON. CHARLES J. FORSBERG, City Collector.

Dear Sir:

We are in receipt of your request of the 5th inst., for an opinion as to whether or not public passenger automobiles kept on public stands, and public passenger automobiles not on public stands, fall within that classification of section 2719

of The Chicago Code of 1911, as amended March 4, 1912, which is as follows:

“Automobile trucks, coaches, omnibuses and other motor vehicles used for commercial purposes * * * \$30.00.”

Your query requires a consideration of the meaning of the term “commercial purposes.” We are of the opinion that a motor vehicle is used for commercial purposes if it is let for hire or reward, and that public passenger automobiles, whether on public stands or not, and also taxicabs, fall within the classification of motor vehicles used for commercial purposes for which the owners are required to pay a license tax of \$30.00.

The power of the city to tax this class of vehicles is in no way affected by the recent decision of the Supreme Court, and if the owners of any such vehicles fail to secure licenses such persons should be prosecuted in due course.

Very truly yours,

LORING R. HOOVER,
Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,
Corporation Counsel.

Condemnation of Land for Purposes of Railway Terminal.

May 7, 1915.

HON. ELLIS GEIGER, Chairman, Committee on Railway
Terminals.

Dear Sir:

In compliance with the request of your committee for an opinion as to the power of the Union Station Company, or any of its constituent railroad companies, to acquire a 20-foot strip of land by condemnation and having acquired the same give to the city an easement therein for street purposes, we beg to advise you that both the Union Station Company and its constituent railroad companies possess power

to condemn, but such power is that of acquiring an easement in land needed for the purposes of the corporation condemning.

Under the law of this state, condemnation proceedings do not give title to the corporation instituting such proceedings, but give merely a right to use the land condemned for the purposes for which the corporation is created, the title remaining where it was at the time the condemnation proceedings were instituted, so that whenever the company ceases to use the land for the purposes for which it was condemned, the title is left clear and unencumbered by the easement created by the condemnation proceedings. If, therefore, either the Union Station Company, or any one of its constituent railroad companies, should condemn a 20-foot strip of land, and, by turning it over to the city for street purposes, evinced a determination to abandon its use for the purposes for which the condemning corporation is organized, the land would be left free and clear of any easement in the hands of the holder of the title, and the city would acquire no rights whatever.

Yours very truly,

CHARLES M. HAFT,

Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,

Corporation Counsel.

Weeds and Refuse on Vacant Property.

May 7, 1915.

HON. OLIVER L. WATSON, Alderman, Twenty-seventh Ward.

Dear Sir:

We have your communication of the 30th ult., transmitting letter to you from the 27th Ward Garbage Vigilance Committee, asking whether or not "an ordinance could be passed by the city council compelling the owners of vacant property to keep the weeds down on same and prevent its use as a dumping ground," and requesting the corporation counsel to return said letter with the information asked so

that you may forward same to the secretary of the committee before the 18th inst.

We think that the City Council is without power or authority to pass an ordinance compelling the owners of vacant property to keep the weeds down.

The state law provides for the destruction of weeds, etc., growing upon public roads (Sec. 137, Chap. 121, Hurd's Revised Statutes of Illinois, 1913), and also makes it unlawful for any person to deposit in a public road, weeds, trash, garbage, etc. (Sec. 143, Chap. 121). The State has also legislated with reference to the destruction of Canada thistles. (Chap. 18, p. 135, *et seq.* and Sec. 40, Chap. 38, Hurd's Revised Statutes of Illinois, 1913.)

The ordinances now in force prohibit the use of vacant property as a dumping ground. Section 1435 of The Chicago Code of 1911 prohibits depositing or placing upon any vacant lot of land anything which by its decomposition could or would become offensive or detrimental to health, and the ordinance of July 2, 1914, prohibits depositing ashes, soot, sand, dust, refuse, offal, rubbish, cinders, dirt, etc., upon any private property or upon any vacant lot or grounds within the limits of the City of Chicago. (See Journal of the Proceedings of the City Council of July 2, 1914, p. 1391.)

We herewith return letter accompanying your communication.

Yours very truly,
 GEORGE B. O'REILLY,
Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,
Corporation Counsel.

Sufficiency of Deceased Surety on Bond of City Depositary.

May 8, 1915.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

We are in receipt of your communication of the 1st inst., requesting an opinion as to "the legal and financial sufficiency of a deceased surety on a city depositary bond".

It appears that your request for an opinion was induced on account of the death of Mr. Edward Tilden, who was a surety upon the bonds given by four banks named in your communication as depositaries of money of the City of Chicago for the year 1915.

By the terms of the bonds in question, the obligors, both principals and sureties, bind themselves, their heirs, executors, administrators, successors and assigns, jointly and severally. In such case, the death of one of the sureties does not end the suretyship as to him, but his estate is liable upon his several liability. (*Moore v. Rogers*, 19 Ill. 346; *Tandrup v. Sampsell*, 234 Ill. 526.) The liability of the sureties on the bonds in question is a continuing one, and the estate of the deceased surety is liable, not only for defaults occurring before his death but also for defaults occurring after his death, in respect to moneys deposited during the year 1915, with the banks which are the principals in the several bonds in question. (*Rapp v. Phoenix Ins. Co.*, 113 Ill. 390; *Royal Ins. Co. v. Davis*, 40 Ia. 469; Pingrey on Suretyship, Sec. 85; 32 Cyc. 84.)

The principals (the banks) in the bonds, and the surviving sureties, also continue liable on the bonds, notwithstanding Mr. Tilden's death. (*Stevens v. Catlin*, 152 Ill. 56; *Tandrup v. Sampsell*, *supra*.)

Any claim against the estate of Mr. Tilden, in order to share in property inventoried in his estate, would have to accrue and be presented against his estate in the Probate Court of Cook County, or suit would have to be brought thereon in a court of competent jurisdiction against his executor, within one year from the granting of letters testamentary by the Probate Court. (*Stone v. Clarke's Admrs.*, 40 Ill. 411; *Snydacker v. Swan L. & C. Co.*, 154 Ill. 220; *Morse v. Pacific Ry. Co.*, 191 Ill. 356.)

While, in our opinion, all sureties continue liable on the bonds in question, notwithstanding Mr. Tilden's death, the fact that such a limited time is allowed by law for filing a claim against his estate in case of default by the principals (the banks) leads us to recommend that an additional bond be required in the case of each of the banks in question and

that such additional bonds be submitted to the City Council for its approval, as was done in the case of the bonds originally taken.

The original bonds provide that the obligation thereby incurred shall not be affected by the fact that the City of Chicago may take additional bond or security to protect itself on account of the same matters and things covered by said original bonds. The taking of the additional bonds, as above recommended, therefore, will not affect the obligation of the parties on the original bonds.

Yours very truly,

BRYAN Y. CRAIG,

First Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,

Corporation Counsel.

Rights of Divorced Wife With Respect to Pension on Account of Deceased Fireman.

May 10, 1915.

TO THE BOARD OF TRUSTEES OF THE

FIREMEN'S PENSION FUND OF THE CITY OF CHICAGO.

Gentlemen:

At a meeting of your Honorable Body, held on April 13th, you submitted to this department for an opinion, the application of Mary Cavanaugh, divorced wife, and mother of Earl Cavanaugh, Beatrice Cavanaugh and Florence Cavanaugh, minor children of Thomas Cavanaugh, deceased, who was a pensioner prior to his death, all of whom are under sixteen years of age.

Section 10 of the Firemen's Pension Act provides that after the decease of a retired member of the Fire Department, his widow, minor child or children, under sixteen years of age, his dependent parent or parents, if any surviving him, shall be entitled to the pension provided for in this act.

The petitioner is not the widow of Thomas Cavanaugh deceased, as she was divorced from him prior to his death.

She makes application, however, as guardian of the minor children referred to. While she may be the natural guardian of these children, a payment to her as such natural guardian would not, in our opinion, be a payment to the children as required by the act.

We recommend, therefore, that application be made for the appointment of a guardian for the estate of these minor children and that the pension be paid to the duly qualified guardian appointed by the court.

Yours respectfully,

JOSEPH F. GROSSMAN,
Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,
Corporation Counsel.

Rights Concerning Pensions When Law Has Been Changed During Term of Service.

May 10, 1915.

TO THE BOARD OF TRUSTEES OF THE
FIREMEN'S PENSION FUND OF THE CITY OF CHICAGO.

Gentlemen:

At the last meeting of your board, you ordered the corporation counsel to advise you as to the rights of one John Prussel, who has made application for a pension.

The applicant, according to the records transmitted with the application, was appointed a member of the Chicago Fire Department January 3, 1891, and served as such until January 13, 1911, on which date he was discharged from the service, after having served twenty years and ten days. On April 7, 1911, the applicant was reinstated as a member of the department, and the order entered on January 13, 1911, was at the same time changed to an order granting Prussel a leave of absence. From April 7, 1911, until March 28, 1913, which is ten days short of two years, Prussel was on active duty. He was discharged from the service of the city on

the last mentioned date. His application for a pension was filed March 22, 1915.

At the date of the application, the pension law in force provided that any member of the fire department, after having served twenty years or more, of which the last two years shall be continuous, may make application to be relieved from such fire department, or if he shall be discharged from such fire department, the board of trustees shall order and direct that such person shall be paid a monthly pension equal to one-half the monthly salary attached to the rank which he may have held in such fire department at the date of his retirement or discharge. (See Section 10, Hurd's Revised Statutes 1913, p. 390.)

Although John Prussel had served more than twenty years as a member of the fire department, the last two years of which were continuous, prior to his discharge on January 13, 1911, we do not believe that the foregoing provision is applicable to his case, because at the time of his permanent separation from the service, which may be taken as of March 28, 1913, the provision for retirement required twenty-two years' service, the last two years of which shall be continuous. (See Section 10, Hurd's Revised Statutes 1912, p. 383.) The law of 1913, which became effective July 1, 1913, is applicable only to persons who were members of the Fire Department on July 1, 1913, and to those who became members thereof, thereafter. In other words, the applicant is not entitled to a pension unless he has been twenty-two years in the service of the fire department, the last two years of which service must have been continuous.

It so happens, that if the time between January 13, 1911, and April 7, 1911, is excluded, the applicant will have to his credit exactly twenty-two years of service, but he will be short ten days in the last two years of actual service.

In view of the change in the order of discharge entered on January 13, 1911, to an order granting a leave of absence, we must treat the period between January 13, 1911, and April 7, 1911, when John Prussel was reinstated, as a period during which the applicant was absent from duty with the consent of the proper authorities. The question then arises as to

what is meant by the term "two years continuous service" as used in the Pension Act.

If the language is construed to mean that during the two years the person must be continuously on active duty, then John Prussel is not entitled to a pension. But we believe that a person may be in the service of the City of Chicago, or any department thereof, although he is not actually performing the duties of his office or position. A person is in the service of the government if he is liable to be called to duty at any time. This distinction seems to be borne out by the rules of the fire department which are now in force and which were issued by the fire marshal pursuant to ordinance in 1911. In rule 33, furloughs and leaves of absence are spoken of as periods during which members of the department are *absent from duty*. By section 14 of said rule 33, officers and members, while on leave, are held accountable for their conduct, whether in uniform or not.

In *Willcock v. Terrell*, 39 L. T. Rep. (U. S.) 84, it was held that a person who is liable to be called to active service, although not then engaged in any active duty, is still in the service of the Government. This is supported by the case of *Reidy v. City of New York*, 77 N. E. Rep. 1011.

We are of the opinion, therefore, that a person who is on leave of absence without pay, is nevertheless in the service of the fire department within the meaning of the Pension Act, and that John Prussel is entitled to be credited with the time between January 13, 1911, and April 7, 1911, during which, according to the records as amended, he was on leave of absence.

In view of the foregoing, John Prussel is entitled to a pension.

Respectfully submitted,

JOSEPH F. GROSSMAN,
Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,
Corporation Counsel.

Contractor's Liability for Damages to Building.

May 11, 1915.

HON. WILLIAM R. MOORHOUSE, Commissioner of Public
Works, Chicago.

Dear Sir:

Your communication of April 30, addressed to the Hon. Richard S. Folsom, Corporation Counsel, for an opinion with reference to the final payment of Fitzsimons & Connell Dredge & Dock Company in connection with their contract of the sub-structure of the double leaf double deck bascule bridge across the South branch of the Chicago river at West Lake street, has been referred to me.

During the progress of this work it appears that some damage was done to the building owned by Mr. Michael Espert on the east bank of the Chicago river at West Lake street and that the Fitzsimons & Connell Dredge & Dock Company had made every reasonable effort on their part to repair the damage, but due to the attitude of Mr. Espert the repairs have not been made.

The contract provides among other things that the contractor shall repair at his own expense all damage done to any structure caused by or resulting from this work. The contract also contains a provision that the city will pay certain sums to said contractor "when the contract shall be wholly carried out and completed on the part of said contractor etc." The usual form of bond was given by the contractor providing for the faithful performance of their contract according to its terms, etc.

It became the duty of the contractor to do everything required of it before final payment should be made, and the payment of the balance of this money before the contractor has made the repairs to Mr. Espert's building would be in violation of the terms of the contract; and this act on the part of the city would constitute a good defense by the surety in an action upon his bond.

This, however, could be overcome by obtaining the consent of the surety company thereto in writing and securing a

council order authorizing you to modify the contract in this regard, which might cause some little delay.

Permit us to suggest, however, that the more equitable way to adjust this matter with the Fitzsimons & Connell Dredge & Dock Company would be for the city engineers to determine what amount of money it will cost to repair the building owned by Mr. Espert and retain that amount until the repairs are made, paying the surplus, if any, to the contractor.

Very respectfully,

P. W. SULLIVAN,
Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,
Corporation Counsel.

Listing of Names of Subscribers in Telephone Directory.

May 12, 1915.

HON. MONTAGUE FERRY, Commissioner of Public Service.

Dear Sir:

We have your communication of the 7th inst., relative to the complaint of H. A. Bishop, 208 S. La Salle street.

It appears that Mr. Bishop has a contract for a single party business line with the right to the use of the same at \$125.00 per year, with three extensions and one directory listing; that he now desires to have also listed in the directory the names of "A. M. Davidson" and "The Gerloch Barclow Co." under his present telephone and to pay \$3.00 for each listing.

You say that you took the matter up with the Telephone Company and were referred to the ordinance, and "apparently according to the ordinance, the Telephone Company has the right to refuse this listing." We think it very clear

under paragraph L (see "L", p. 634, Journal of the Proceedings of the City Council of May 26, 1913) that the company has the right to refuse such listing.

You say that you wish to inquire whether or not, in our opinion, "Class L service, as shown in paragraph C of the ordinance was intended by the framers of the ordinance to be classed as unlimited or flat rate service." Paragraph C obviously refers to both unlimited and flat rate service—unlimited service in residences and in business places to those who have a single party business line with the right to the unlimited use of same at \$125.00 per year, and flat rate service, though not unlimited, in all other business places.

Paragraph L (p. 634) of the ordinance providing for the furnishing of telephone directories and the listing of names therein, gives those who have a single party business line, with the right to the unlimited use of the same at \$125.00 per year, the privilege of listing in the directory the names of not more than three "partners, officers, employees or members of the family of such lessee." This provision is the same as that contained, relative to this kind of contract, in the ordinance of November 6, 1907. (See paragraph I, p. 3119, Journal of the Proceedings of the City Council of November 6, 1907.)

The words you refer to in parentheses in paragraph L (p. 634) of the ordinance of May 12, 1913, specifically except lessees having a single party line at \$125.00 per year from the privilege of inserting additional names at \$3.00 per annum each.

We perceive no ambiguity whatever in the paragraphs of the ordinance under C (p. 629) nor under L (p. 634) of the ordinance of May 26, 1913.

Yours very truly,

GEORGE B. O'REILLY,
Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,
Corporation Counsel.

Elevated Railroads Controlled by General Railroad Act.

May 14, 1915.

HON. HENRY D. CAPITAIN, Chairman, Committee on Local Transportation.

Dear Sir:

Replying to your communication of May 13, we advise you that if the bill, drafted by this department and presented to you, authorizing the consolidation of surface and elevated railway lines, were to become a law, municipal ownership and operation of the merged property could not be exercised by the City of Chicago in the absence of further legislation, by reason of the fact that Section 1 of the so-called Mueller law confers power upon every city in this State "to own, construct, acquire, purchase, maintain and operate street railways within its corporate limits."

In view of this language, the pertinent question for determination is, does the term, "street railways" include the elevated railways now operated in the city.

We had occasion, in *Metropolitan Elevated Railroad Company v. Chicago*, 261 Ill. 624, to contend that such elevated railways were street railways irrespective of the style of the corporations owning and operating them, and the Supreme Court in that case, at page 630, disposed of our contention in the following language:

"It is further insisted that the elevated railroads or corporations organized under the Railroad Law are street railways. Even if that term could properly be applied to them it would not be conclusive that in running their trains from station to station they pursue a like occupation with omnibus drivers, hackmen or cabmen. But they are not street railways. Those minor portions of elevated railroads located in streets have been spoken of in various cases as street railroads, but always with the meaning that they were railroads in streets, and it was decided in *Knopf v. Lake Street Elevated Railroad Co.*, 197 Ill. 212, that an elevated railroad of a corporation organized under the General Railroad Act is not a street railway."

We are, therefore, impelled to the conclusion that the elevated railways may not be regarded as street railways, and we have therefore prepared an amendment to Section 1 of the Mueller law, conferring upon cities the same power with reference to elevated railways that the act in question now gives them with reference to street railways, and herewith hand you the bill covering such amendment.

Yours truly,

CHARLES M. HAFT,
Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,
Corporation Counsel.

Bathing Beach Frontage Consents.

May 17, 1915.

HON. HENRY ERICSSON, Commissioner of Buildings.

Dear Sir:

We acknowledge receipt of your communication of May 5th, 1915, to this department. An opinion is asked as to whether or not, in issuing an amusement license to the owners or lessees of the Wilson avenue bathing beach, Section 363 of The Chicago Code of 1911 is to be considered as controlling or affecting said application.

Said section is, in part, as follows:

“363. Frontage consents required.) It shall hereafter be unlawful for any person, firm or corporation, to build, construct, establish, produce or carry on, any amusement within any ground, garden or enclosure of the kind commonly known and described as amusement parks, wherein shows of different classes are offered or presented by one or more concessionaires, without first securing written frontage consents as required by the ordinances of the City of Chicago. * * *”

From the above section, as quoted, and also in describing the seventh class of amusements (amusement parks) in Section 106 of said code, it will be seen that one of the controlling

features of an amusement park is that it is enclosed, and, as we understand it, bathing beaches are unenclosed. There is also one other distinctive feature connected with amusement parks, which is that as well as being enclosed there is always an admission fee required for entrance to same.

Therefore, in view of the ordinances, as above quoted, we are of the opinion that Section 363 of The Chicago Code of 1911 is not to be considered in issuing an amusement license to the owners or lessees of a bathing beach.

Yours respectfully,

M. W. CAGNEY,
Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,
Corporation Counsel.

Details of Monthly Certificates from Street Railways.

May 17, 1915.

HON. E. R. PIKE, City Comptroller.

Dear Sir:

Replying to your inquiry of May 12, relative to the right of the city to demand of the various street railway companies that the detail of the monthly certificates accompany the same, and the right of the city to question such certificates, we beg to advise you that there is nothing in Section 7 that specifically covers the question of the right of the city to demand of either the companies or the board of supervising engineers that the details pertaining to any certificate accompany such certificate. It would seem, however, that a certificate would be practically meaningless and useless without the accompanying detail, if the comptroller is expected to give to such certificates any intelligent consideration.

While Section 7 makes the certificate of the board final and binding, the language implied by that section undoubtedly means that such certificate shall be final and binding only in the absence of fraud or mistake. While we believe

that there would be no hesitancy on the part of the board in furnishing to the city comptroller the detail pertaining to each certificate, if, for any reason, the board should decline so to do, ample authority will be found in Section 29 for the procurement of the desired information. That section provides, in part, that the

“City comptroller, or accountants authorized by him, under the direction of the mayor and City Council of said city, shall have the right at all reasonable times to examine all the books, vouchers and records of the receipts and expenditures of the company, for the purpose of ascertaining the accuracy of the reports herein required and the rights of the city under this ordinance.”

While there is nothing to be found in the ordinance concerning the right of the city on the one hand, or the street railway companies on the other, to have or obtain a stenographic report of the proceedings of the board of supervising engineers, the city undoubtedly has the right, as one of the interested parties, to be fully advised concerning the proceedings of said board, and to accomplish that end, have a stenographic report of the proceedings of said board.

Yours truly,

CHARLES M. HAFT,
Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,
Corporation Counsel.

Effect of Special Orders on Existing Ordinances.

May 17, 1915.

HON. JOHN DILL ROBERTSON, Commissioner of Health.

Dear Sir:

We acknowledge receipt of the communication of Dr. Young, Commissioner of Health, to this department, dated February 9, 1915, asking whether or not special orders passed by the council which have the effect of amending an ordinance are to be regarded as an amendment to an ordinance.

Our courts regard resolutions and orders as synonymous and the decisions are uniform and pronounced as to their inefficacy in modifying ordinances.

Two leading cases on this matter are: *Hibbard & Co. v. City of Chicago*, 173 Ill. 91, and the *C. & N. P. R. R. v. City of Chicago*, 174 Ill. 439, which have been followed by all the later decisions on these questions.

In the case of *C. & N. P. R. R. Co. v. City of Chicago*, *supra*, it was sought by a resolution to fix the grade of a street, which could only legally be done by an ordinance, and our Supreme Court (on page 444) reviewed the law as follows:

“The proof in the case showed, that the order of March 23, 1896, was not styled in accordance with Section 2 of Article 5 of Part 1 of the City and Village Act. Section 2 requires that the style of the ordinance in cities shall be: ‘Be it ordained by the City Council of’ The proof also shows that the order of March 23, 1896, was not passed by a majority of the members of the City Council, as required by Section 13 of Article 3, Part 1 of the City and Village Act; also, that the yeas and nays were not taken upon its passage, as required by said Section 13; also, that the yeas and nays were not duly entered upon the Journal of the Proceedings of the City Council, as required by said Section 13; also, that the same was not presented to the mayor for his approval, as required by Section 18 of said Article 3. (*Barr v. Village of Auburn*, 89 Ill. 361; *Hackman v. Village of Staunton*, 42 Ill. App. 409; *Schofield v. Village of Hudson*, 56 id. 191.) It is thus clearly shown, that the order in question lacked the requirements, which the statute makes necessary, in order to constitute a valid ordinance. The order in question was nothing more than a mere resolution, and in no sense an ordinance. * * *

“But an ordinance cannot be amended, repealed or suspended by a resolution. The act which amends, modifies or repeals a law should be of equal dignity with the act which enacts or establishes the law. A *resolution or order* is not a law, but merely the form in which the legislative body expresses an opinion. An ordinance prescribes a permanent rule of conduct or government, while a resolution is of a special and temporary character. Acts of legislation by a municipal corporation,

which are to have continuing force and effect, must be embodied in ordinances, while mere ministerial acts may be in the form of resolutions. It is true that, where the charter of a municipality is silent as to the mode in which the City Council shall perform an act, the decision of the council may be evidenced by either a resolution, or an ordinance. But where the charter requires an act to be done by ordinance, or where such a requirement is implied, as it is here, by necessary inference, a resolution is not sufficient, but an ordinance is necessary. (17 Am. & Eng. Ency. of Law, pp. 235-236; Horr & Bemis on Mun. Police Ordinances, Sec. 210; 1 Dillon on Mun. Corp. (4th Ed.), Sec. 30 and notes; *City of San Antonio v. Micklejohn*, 89 Tex. 79.) * * *

"Paragraph 7 of Section 1 of Article 5 of Part 1 of the City and Village Act enumerates among the powers of city councils in cities, the power 'to lay out, establish, open, alter, widen, extend, grade, pave or otherwise improve streets,' etc. Paragraph 96 of said Section 1 enumerates, among the powers of city councils of cities, the power 'to pass all ordinances, rules and make all regulations proper or necessary to carry into effect the powers granted to cities,' etc. Immediately following said paragraph 96 is Section 2, which specifies what shall be the style of an ordinance in cities. By the paragraphs and sections thus referred to, it is made clear that the common council is required to pass such ordinances, rules and regulations as are necessary to carry into effect the powers granted to the city, and that among these powers is that of grading the streets. Acts of the city, which have for their object the carrying into effect of the charter powers thus granted, are legislative in their character; and it is well settled, that acts of municipal corporations which are legislative in their character must be put in the form of ordinances, and not of mere resolutions. (17 Am. & Eng. Ency. of Law, p. 236, and cases referred to in notes.) A resolution is a much less formal act than an ordinance. 'Ordinances, rules and regulations,' as used in paragraph 96, above referred to, are identical in meaning. (*State v. Lambertville*, 45 N. J. L. 282; *Kepner v. Commonwealth*, 40 Pa. St. 124.) It follows, that the order of March 23, 1896, did not have the effect of establishing the grade of West Taylor street, because, viewed as an original act of the city council, it was not an ordinance, and, viewed as an attempted enlargement of previous ordinances, it was not of equal

dignity with the legislative acts which it attempted to qualify.

"*City of Quincy v. Chicago, Burlington and Quincy Railroad Co.*, 92 Ill. 21, is not inconsistent with the doctrine here announced, as, in that case, there was a conveyance of the street absolutely to the railway company under the resolution mentioned in the case, and the city had recognized for over twenty years the resolution passed by it, which granted the right to the railroad company to lay its tracks in certain streets. There, the resolution was held to be binding, because of the deed made under it and the long possession held under it. No such state of facts, however, exists in the case at bar."

In the case of *Hibbard & Co. v. City of Chicago, supra*, permission was granted to a certain firm by resolution to suspend what might be called a permanent awning over the sidewalk, the plans for which, under the resolution, were to be submitted and approved by the commissioner of public works. This resolution, was in fact, a modification of the ordinance concerning street awnings, granting a special privilege to the firm in question, and the court in passing upon the question says in part as follows:

"An ordinance * * * can only be repealed or amended by an ordinance of the city. A mere resolution or order by the city council, not passed and published as an ordinance of the city would not constitute a repeal of an ordinance duly passed. * * * A resolution of the city council or an order of that body may be adopted as an order or resolution by a majority of a quorum present, but such order or resolution so adopted would not necessarily require the concurrence of a majority of the members elected in the city council, and in this respect the adoption of an order or resolution materially differs from the adoption of an ordinance. * * * This order amounted to no more than a license, and was subject to revocation by the city council at any time.

"Where the city has authorized a temporary use which causes a temporary obstruction, one having been licensed to exercise such temporary use would not be liable for a penalty, under the ordinance, for obstructing the street, as it was permitted as a matter of grace or favor. That such permission was given may be implied from circumstances. (*Gridley v. City of Bloom-*

ington, 68 Ill. 47.) But when the city demands the removal of such a structure, it, if permitted to remain thereafter, becomes a nuisance. *State v. Woodward, supra; Commonwealth v. King, supra; State v. Atkinson, supra; Chamberlain v. Enfield, supra.*

“With an ordinance in existence prohibiting the erection of awnings, a resolution of this character, amounting to a mere license to this particular firm, is a special privilege granted to one by license, which, by the general ordinance applicable to all the citizens within the corporate limits of the City of Chicago, is prohibited to others. Whatever is prohibited by the constitution of the State from being done by the legislature cannot be done indirectly through another body, and an ordinance of a municipal corporation must be in harmony with the general laws and constitution of the State, and whenever such ordinance comes in conflict with the constitution it is void.

“A municipal corporation cannot confer power upon one person to do an act which is prohibited to another having an equal right to do the same act, and ordinances cannot favor or discriminate against any person or class of persons, but must be uniform and of general operation within the corporate limits. A *license to erect an awning* of this character, although it might not render the person who erected the same amenable to punishment for the violation of an ordinance of the city, is still not a license binding on the city, nor irrevocable. Nor is it of such a character that the commissioner of public works, in the discharge of his duties, may not, without the action of the city council, remove it, because the city had no power to grant the permanent use of the public street for private purposes, nor can it discriminate between citizens within the municipality. Having no power to make such a discrimination or authorize the erection of such awning as a permanent structure without power on its part to have the same removed, no estoppel can be based on the mere resolution or order of the city council as enacted, because no estoppel can arise from an act of a municipal corporation or officer done in violation of or without authority of law. *Seager v. Mueller*, 133 Ill. 86; *Pettis v. Johnson*, 56 Ind. 139; *Stevens v. St. Mary's Training School*, 144 Ill. 336; *Day v. Greeb*, 4 Cush. 433.

“The right of the public to the exclusive use of the street for public purposes is inconsistent with the right of a private citizen to encroach thereon by the erection

of a permanent structure. The streets are held in trust by the municipality, and this fact prevents the municipality from authorizing any encroachment on or obstruction of them by such structure. The mere consent of the city council by resolution or order gives no vested right. (*Eli v. Campbell*, 59 How. Pr. 133; *City of Brooklyn v. Fury*, 30 N. Y. Sup. 349; *Eichenlaub v. City of St. Joseph*, 113 Mo. 395.) The averment that the awning so erected does not injure or obstruct any person does not change the case. The sole question to be determined is, is it an encroachment on the street of the city, and if so, it is a purpresture.

The judgment of the Appellate Court is affirmed."

To the same effect as the above quoted decisions, is Dillon on Municipal Corporations (Sections 571, 572, 5th ed., citing many authorities); *Hope v. City of Alton*, 214 Ill. 102; *People v. Blocki*, 203 Ill. 363, on page 372.

Therefore, we are of the opinion that an order passed by the City Council cannot amend an ordinance. An ordinance can only be amended by an act of equal dignity and with the same formalities as is required for the passage of the ordinance in the first instance.

Respectfully submitted,

M. W. CAGNEY,

Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,

Corporation Counsel.

Cancellation of Bond of Chicago Railways Co.

May 19, 1915.

HON. HENRY D. CAPITAIN, Chairman, Committee on Local Transportation.

Dear Sir:

In compliance with the request of your committee for an opinion concerning the request of the Chicago Railways Company that the city consent to the cancellation of a certain bond, the condition of which is:

“Now, THEREFORE, if the above bounden Chicago Railways Company shall promptly prosecute or cause to be prosecuted the aforesaid suit in the United States Circuit Court and shall procure or cause to be procured a final decree to be entered therein in favor of the Chicago Consolidated Traction Company or its receivers forever restraining the collection of the taxes extended against the capital stock assessment of the Chicago Consolidated Traction Company for the year 1909, or in default thereof shall promptly pay or cause to be paid said taxes in full together with all penalties in full thereon and all costs of said suit taxed against the Chicago Consolidated Traction Company or its receivers, and shall pay or cause to be paid promptly when due all taxes levied and assessed for the year 1910 upon the property, or any part thereof, of the Chicago Consolidated Traction Company or any of its grantor or lessor or subordinate companies for said year so far as said property lies within the limits of the City of Chicago, then this obligation to be null and void, otherwise to be and remain in full force and virtue.”

We beg to advise you that the clear purpose of the bond was to insure the freedom from a lien for capital stock taxes for the year 1909 of the property of the Consolidated Traction Company which was then being acquired by the Chicago Railways Company.

We have examined the order entered by Judge Landis, a copy of which is attached to your letter, and we are of the opinion that Judge Landis had jurisdiction of the subject-matter concerning which the order was entered. It is, therefore, unnecessary to discuss any question as to the correctness of the order entered. This is particularly so in view of the fact that the time for appeal from said order has lapsed, and that said order is, therefore, binding on all parties to the proceeding wherein the order was entered.

The only question that need receive any consideration, therefore, is whether or not this order in effect complies with the condition of the bond which provides that the railways company “shall procure, or cause to be procured, a final decree to be entered therein in favor of the Chicago Consolidated Traction Company, or its receivers, forever restraining the collection of the taxes levied against the capital stock

assessment of the Chicago Consolidated Traction Company for the year 1909.”

The order by Judge Landis does not in terms comply with the condition of the bond. We are, however, of the opinion that the order accomplishes the purpose sought by the condition of the bond, although that purpose is accomplished in a manner other than that specified in the condition of the bond.

We, therefore, see no reason why the city should not consent to the cancelation of the bond in question.

Yours very truly,

CHARLES M. HAFT,
Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,
Corporation Counsel.

City Comptroller's Supervision of Expenditures of Election Commissioners.

May 20, 1915.

HON. EUGENE R. PIKE, Comptroller.

Dear Sir:

We have your letter of May 12, 1915, asking us to advise you as to the legal rights of the comptroller in the matter of supervision of the expenditures of the Board of Election Commissioners.

You state in the communication referred to that the vouchers submitted to you for payment carry insufficient detail to intelligently pass on the correctness of the expenditures.

Section 1 of Article VII of the act creating the election commissioners provides for the salaries of the commissioners and the chief clerk, and requires these to be paid by the county. Then follows this language:

“All expenses incurred by such board of election commissioners shall be paid by such city. Such salaries

and expenditures are to be audited by the county judges, and such salaries shall be paid by the county treasurer, upon the warrant of such county judge, of any money in the county treasury not otherwise appropriated, and such expenditures shall be paid by the city treasurer upon the warrant of such county judge, out of any money in the city treasury not otherwise appropriated. It shall also be the duty of the governing authority of such counties and cities respectively to make provision for the prompt payment of such salaries and expenditures, as the case may be." 3 Jones & Addington Ill. Statutes Annotated, pages 2724, 2725.

It will be seen from the foregoing that the county judge has been given authority by statute to perform that function relating to the necessary current expenditures of the election commissioners which the city comptroller has; by ordinance, in regard to other departments of the city government. The mandate of the statute that the city treasurer shall pay the expenses of the Board of Election Commissioners, upon the warrant of the county judge, is clear and unmistakable. This provision of the election law has been upheld by our Supreme Court in the case of *Wetherell v. Devine*, 116 Ill. 631.

It is only by reason of the ordinances in force in the City of Chicago and for the convenience of the city treasurer that the vouchers go through your office.

We are of the opinion that the finance department of the City of Chicago has no other function to perform in regard to the expenditures of the Board of Election Commissioners except to pay upon the warrant of the county judge.

Respectfully submitted,

JOSEPH F. GROSSMAN,
Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,
Corporation Counsel.

NOTE—See *Empire Voting Machine Co. v. City of Chicago et al.*, 267 Fed. 162; certiorari denied, 254 U. S. 642.

City Warrants as Negotiable Instruments.

May 21, 1915.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

Your letter in reference to the voucher for \$700 endorsed by Mr. John M. Kantor and payable to the Estate of Frank W. Solon was referred to the undersigned for consideration and reply.

You state in your letter that on April 28, 1915, the comptroller received a voucher in favor of Mr. Kantor in the sum of \$1,500 for services as commissioner for making special assessment for widening Polk street from South Clark street to South State street. You further state that prior to receiving the voucher verbal notice was given by Mr. Schilling, the president of the Board of Local Improvements, to the effect that Mr. Kantor was indebted to Frank W. Solon, deceased, in the sum of \$700 on account of Solon's claim against this voucher; that upon receiving such notice you declined to pay the full amount to Mr. Kantor, and two warrants were made covering the amount of the voucher—one for \$800, which was paid to Mr. Kantor, and the other for \$700, which Kantor endorsed payable to the Estate of Frank W. Solon. Since then Mr. Kantor has claimed the \$700, saying that he was not indebted to the Solon estate, and declaring that the endorsement was procured from him under duress. The question presented is whether it would be proper for you to make out a new warrant for the \$700 and turn it over to Mr. Kantor, thereby ignoring the transfer made by him and invalidating the warrant endorsed by him.

In our opinion it would be unsafe for the city authorities to turn over either the new warrant or the one endorsed to Mr. Kantor, such warrant being a negotiable instrument duly endorsed and now only accidentally in the possession of the comptroller.

The writer made some inquiries concerning the transaction and was advised by Mr. Schilling, formerly president of the Board of Local Improvements, and who originally handled the affair, that when Kantor was employed he agreed to

accept as compensation one-half of the sum allowed for the purpose in view of the fact that Solon had done all the work that was required of him as commissioner except the signing of the report. Mr. Kantor's work was thereby lessened and he was willing to accept half of the amount to be paid as full compensation for what he did. The only reason why there was not a division of \$750 for each was that another party who made an examination of a building had to be paid \$100 out of the \$1,500.

Mr. Schilling's statements are corroborated by Senator Glackin and Mr. Henry D. Lutzenkirchen; on the other hand, Mr. Kantor denies having made any agreement and claims that no work whatever was done by Solon. We do not assume that we are called upon to express any opinion as to who is to be believed in this matter. It is sufficient that the city is put on its guard by reason of the fact that the claim is made that services were actually performed by Solon and that the endorsement of the warrant was a voluntary act on the part of Kantor. The comptroller stands in the position of holding a warrant which belongs to adverse claimants. He cannot assume in view of the statements made that there was no consideration for the endorsement, and he cannot assume that fraud, duress or other unlawful means were used to procure the endorsement. He would render himself liable under the circumstances if he turned over the warrant to either of the parties claiming it without having the sanction of a court of competent jurisdiction.

We, therefore, recommend that a bill of interpleader be filed on behalf of the city, which will enable the adverse claimants to come into court and assert their rights. Any other course taken on the initiative of the city might result in fixing liability so that double payment of this amount would have to be made.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,
Corporation Counsel.

Terms of Inspectors of House of Correction.

May 22, 1915.

HON. WILLIAM HALE THOMPSON, Mayor.

Dear Sir:

In response to your request concerning the expiration of the terms of office of the present members of the Board of Inspectors of the House of Correction, we advise you that appointments were made on July 17, 1911, as follows:

M. A. Weisskopf, term to expire July 17, 1912.

Matthias Aller, term to expire July 17, 1913.

A. A. Burger, term to expire July 17, 1914.

Thereafter, appointments were made as follows:

October 27, 1913, M. A. Weisskopf, term to expire
October 27, 1915.

October 27, 1913, Matthias Aller, term to expire
October 27, 1916.

October 5, 1914, Joseph J. Janda, term to expire
October 5, 1917.

The statute that controls the appointment of this board is Section 2 of Chapter 67, Hurd's Revised Statutes, which provides, in part:

"The mayor of said city shall, by virtue of his office, be a member of said board, who, together with three persons to be appointed by the mayor, by and with the advice and consent of the legislative authority of said city, shall constitute the said board of inspectors. The term of office for the appointed members of said board shall be three years, but the members first appointed shall hold their office, respectively, as shall be determined by lot at the first meeting of said board, for one, two and three years from and after the first Monday in May, in the year of our Lord, 1871, and thereafter one member shall be appointed each year for the full term of three years."

It seems that the appointment of members of said board did not receive very prompt attention for a number of years prior to July 17, 1911, and that prior to the date last afore-

said, and beginning with July 13, 1903, the only appointments made were as follows:

July 13, 1903, George Mason,
May 28, 1906, John J. Sloan,
July 13, 1908, Charles A. McCulloch.

It will, therefore, be noted that when appointments were made on July 17, 1911, the three-year term of office of the three members appointed July 13, 1903, May 28, 1906, and July 13, 1908, respectively, had by the terms of the statute expired, so that, if each member appointed is entitled to hold office for the full term of three years, there were three vacancies when Weisskopf, Aller and Burger were appointed July 17, 1911.

If the rule laid down in *People v. Reinberg*, 263 Ill. 536, is to be followed, the members appointed July 17, 1911, would have a full three-year term to serve from that date. It therefore follows that when the mayor, on July 17, 1911, appointed Weisskopf, Aller and Burger, and fixed the expiration of their terms of office so that they would expire July 17, 1912, July 17, 1913, and July 17, 1914, the mayor undertook to exercise the power to fix the term of office which he is without authority to do, inasmuch as the statute expressly fixes the term at three years.

Therefore, the terms of Weisskopf, Aller and Burger did not expire on the dates fixed by the mayor in his appointment, but all did expire on the same date, to wit, July 17, 1914; in consequence whereof it follows that when the mayor, on October 27, 1913, appointed Weisskopf and Aller to membership on said board, such appointment was nugatory because there was no vacancy existing on said board. Inasmuch as no appointments have been made to said board, except as hereinafter stated, since July 17, 1914, it follows that the terms of office of M. A. Weisskopf and Matthias Aller have expired, and you are now at liberty to appoint their successors.

A different situation, however, exists as to Joseph J. Janda, the remaining member of said board, because his term of office, resulting from his appointment on July 17, 1911,

expired on July 17, 1914. So that, when he was re-appointed on October 5, 1914, it was within the power of the mayor to appoint him, and his term of office, under the rule stated in the Reinberg case, will not expire until October 5, 1917.

We are not unmindful of the fact that by following the rule stated in this opinion the apparent intention of the Legislature to have one member appointed to said board each year will be thwarted, nevertheless, under our system of government, the Supreme Court, and not the Legislature, has the last say, and the latter, therefore, is mightier than the former, and we are bound by its conclusions.

Yours respectfully,

CHARLES M. HAFT,
Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,
Corporation Counsel.

Dedication and Acceptance of Streets.

May 24, 1915.

TO THE MAYOR AND ALDERMEN OF THE
CITY OF CHICAGO IN THE CITY COUNCIL ASSEMBLED.

Gentlemen:

The ordinance attached hereto has had careful consideration by the Committee on Local Industries, and after an elaborate hearing the committee voted to recommend the passage of same upon the advice of the corporation counsel given orally, in substance as follows:

The property in question is known as part of Canalport, which was subdivided in 1835. Streets and alleys were appropriately designated on the plat and names were given to the streets. The streets were not laid out directly north and south, but were laid out to correspond with the Illinois and Michigan Canal, which had its terminus at that place, to-wit, at the southwest corner of Ashland avenue and the river.

At that time, on account of the canal terminating there,

it was thought that a town would spring up. Some of the lots were sold in the subdivision, but none were sold within the last twenty-five years. The subdivision did not appear on the atlases of the Map Department until about seven years ago. The original subdivision could not be found, nor could an authentic copy of same be found.

The subdivision extended a considerable distance north of the West Fork of the South Branch of the Chicago river, which is now a part of the Drainage Canal. It extended south and east from the said river to Ashland avenue and west to 31st street. Between Ashland avenue and the West Fork of the South Branch of the Chicago river, about midway, is the Illinois and Michigan Canal. The land south of the West Fork of the South Branch of the Chicago river was occupied by squatters for a long number of years, and while occupying these premises the streets as laid out originally were never recognized by the inhabitants, nor have they been since.

The Santa Fe Railway acquired title to the property lying between the West Fork of the South Branch of the Chicago river and the Illinois and Michigan Canal over twenty-five years ago, and in so doing it purchased whatever interests the people claimed by prescription and all interests anyone held in the lots by deed or otherwise. The said railway has been in open, adverse and continuous possession of the land for more than a quarter of a century. The land in question lies between the West Fork of the South Branch of the Chicago river on the north, the Illinois and Michigan Canal on the south, the center line of Section 38, which would be Robey street if extended, on the west, and Ashland avenue on the east.

On March 9, 1914, the City Council of the City of Chicago passed an order directing the corporation counsel to take the necessary steps to recover from the Atchison, Topeka and Santa Fe Railway Company the public streets lying in the Town of Canalport, north of the Illinois and Michigan Canal.

The City of Chicago threatened to take possession of said streets by virtue of said order shortly thereafter. The Atchi-

son, Topeka and Santa Fe Railway Company filed a bill in chancery in the United States District Court, asking for an injunction against the City of Chicago from interfering with their right of possession of said street. Said suit is now pending in said court.

Shortly after the case was at issue, the court appointed Jesse Holdom, former Judge of the Superior Court, special master in chancery, to hear the testimony and report his conclusion in regard to the right of the Santa Fe Railway to occupy all the said property, including the streets. Testimony was taken before said master from time to time on behalf of the Atchison, Topeka and Santa Fe Railway. The proof went back over fifty years, and in so doing, it was necessary to get the testimony of witnesses that are now very old and feeble.

On two different occasions, a member of the corporation counsel's office and the lawyers for the Santa Fe Railway, together with the special master in chancery, went to the homes of some of these witnesses to take their testimony, and in every instance the witnesses testified that they were acquainted with the property and never knew of any streets being used, never knew the names of any streets, that the property in question, long years ago, was occupied by squatters, but not according to any regularly laid out streets. After the testimony of the Santa Fe Railway was all in, the Law Department made a strenuous effort to find some testimony that might indicate that these streets had been used as public thoroughfares. In so doing, the person having it in charge spent many weeks interviewing witnesses to discover, if possible, some evidence that would tend to show some act of acceptance on behalf of the municipality. The only evidence that could be secured, was the fact that Robinson street, one of the original streets, extending from 31st street to the Illinois and Michigan Canal, was accepted, but not across the said canal onto the property of the Santa Fe Railway, although in the same subdivision.

Another street known as May street (the early squatters called it Mayflower street) extended from Ashland avenue

across the South Fork of the Illinois and Michigan Canal, and then took an easterly direction back to Ashland avenue. Teams used this street from Ashland avenue across the South Fork of the Illinois and Michigan Canal. Water mains were laid therein from Ashland avenue across the said South Fork, and then turned easterly into Ashland avenue. These were the only two streets concerning which any evidence at all could be found to show that they were accepted by the public, but, as we have said, neither of these streets extended onto the property of the Santa Fe Railway.

Our court has held time and again that two things must concur before a strip of ground laid out on a plat becomes a public street. First, there must be a tender of dedication by the owner; and, second, there must be an acceptance by the municipality. This acceptance must take place whether it is a statutory dedication or a common law dedication.

Your committee was no doubt advised by a member of the Law Department, that inasmuch as Robinson street and May street in a part of the subdivision were accepted by the public, that that would be an acceptance of all the streets in the subdivision. This advice was thought correct at the time on account of the case of *Kimball v. City of Chicago*, 253 Ill. 105. In discussing what are some of the acts of acceptance, the court there says at page 112:

“We are of the opinion that by the plat an offer to dedicate said strip to the public as an alley was made, and the only remaining question to be determined is, does the record show an acceptance of the offer to dedicate the strip before the offer of dedication was withdrawn? If the plat was a statutory plat the offer could only be withdrawn by a vacation of the plat under the statute, but if it was a common law plat the offer of dedication might be otherwise withdrawn before acceptance. The evidence shows that the streets of the subdivision have been improved by the city by paving, constructing sidewalks, putting in sewers, placing lamp-posts, etc., in the streets. It is urged, however, that this particular strip had not been so improved. This is true to a large extent, as the land was open and there was but little occasion to travel upon this strip; but it was not necessary that all the streets and alleys of the subdivision should be im-

proved at once and utilized by the city or be lost to the city. An acceptance may be express, as by some positive act of the municipality evidenced by an ordinance or resolution, or an acceptance may be implied from the acts of the city or the public, as by making improvements or by travel; and where it clearly appears that the principal streets and alleys of a subdivision have been accepted by the municipality, the presumption then obtains that all the streets and alleys of the subdivision have been accepted, unless there is something which shows the acceptance to have been limited, and there is no proof in this record that the city declined to accept any portion of the plat, and that being true, the acceptance of a part was an acceptance of the whole plat."

If the court would have allowed this decision to stand, there would have been some chance for the city to make a fight for these streets, but since then, the court has very materially modified that opinion on several occasions.

The first case decided against the City of Chicago is *Heppes Company v. City of Chicago*, 260 Ill. 506. There the court held that the original dedicator had a right to vacate any portion of the subdivision under Section 7, Chapter 109, of the Vacation Act, even after acceptance. If this decision is not modified, it will be a great detriment to the municipalities of the state, especially to the City of Chicago.

Under that ruling, there is nothing to prevent the closing of State street or Washington street by the original dedicator or his successors.

In another case decided in favor of the city in the last term, entitled *Consumers Company v. City of Chicago*, 268 Ill. 113, the court was compelled to disregard the Heppes case, and the opinion held in substance that there could not be a vacation, after acceptance, following the case of *Saunders v. City of Chicago*, 212 Ill. 206. There is no question but what the Heppes case, as it relates to this proposition of law, will be and must be repudiated. If not, it will be necessary for the city to go to the Supreme Court of the United States, because a Federal constitutional question is involved. However, inasmuch as the Heppes Company case is simply dictum on

this subject, we feel certain that our Supreme Court will not follow it in the future.

As we said, the question of whether or not an acceptance of part of the streets and alleys in the subdivision is an acceptance of the remaining streets and alleys, has again been passed upon since the Kimball case, *supra*. The court has held in at least four or five subsequent cases that an acceptance of part of the streets and alleys in the subdivision is not an acceptance of the whole, and that the acceptance of a part of a street is not an acceptance of the balance of it.

In *Moore v. City of Chicago*, 261 Ill. 59, the court says:

“It is conceded that there was an acceptance of One Hundred and Sixth street, but under the circumstances shown in this record such acceptance cannot be held to indicate an intention to accept all the streets in the Cooper Addition. The street railway company threw up an embankment and placed a street car track thereon and commenced the operation of the road. This embankment had no connection whatever with any other street in the addition, and it is shown by the character of the improvement that it could not form a part of any system of improvement that would connect with any other street shown on the plat, and the same may be said of the elevated plank sidewalk. All of the other streets were left wholly unimproved, submerged with water, overgrown with weeds, and with no stakes or other monuments to indicate where they were. Acceptance on the part of a municipality of an offer to dedicate a street must be by some overt, unequivocal act indicating an intention to appropriate to the public use the proposed dedication. It is not reasonable to attribute to the Village of Hyde Park an intention to accept the rights and duties imposed upon the municipality by assuming control over all the streets shown on this plat from the mere fact of its acceptance of one single street running east and west along the northern boundary of the addition. The acceptance by the Village of One Hundred and Sixth street cannot be held to be an acceptance on its part of all the streets and alleys in the addition. The law is well settled that when a person plats property into a subdivision and maps out streets thereon the authorities may accept them in whole or in part. The public is not compelled to assume the burdens imposed by accepting every part of an offered dedication. An

acceptance of a part is not an acceptance of the whole; and this was the holding of this court in *City of Chicago v. Drexel*, 141 Ill. 89, and reaffirmed in *Reichert Milling Co. v. Village of Freeburg*, *supra*. The streets to which the City of Chicago is now setting up title have lain out in the swamp, covered with water, without any improvement or user of any kind, for more than forty years.

“In our opinion, the vacation deed made before the commencement of this suit had the effect of withdrawing and canceling all of the Cooper plat south of the south line of One Hundred and Sixth street and north of the Calumet river and east of Carondelet avenue. The judgment below was in accordance with the views herein expressed.”

To the same effect, the court held in the case of *Casey v. City of Chicago*, 263 Ill. 147, and again in *Chicago, Milwaukee and St. Paul Railway Company v. City of Chicago*, 264 Ill. 24, this decision being handed down last June, the court held that, simply because the city had improved certain streets lying north of a road dividing a subdivision, it did not raise the presumption that strips shown on the plat south of the dividing road were accepted by the city as streets where for more than thirty years such strips have been in the open, continuous, adverse and undisputed possession of private owners without any attempt on the part of the city to improve same.

This case had to do with the property located between Western avenue on the east, California avenue on the west, Division street on the north and Fulton street on the south. About midway between Fulton street and Division street is Ohio street. Ohio street from Western avenue extends east three or four miles to Lake Michigan, and for about two blocks it extends into the subdivision and appears as an improved street. Dwelling houses are built on each side of it and a water main is in the street, but it was obstructed about midway between Western avenue and California avenue, or midway of the subdivision east and west. Grand avenue extends from Western avenue in a northwesterly direction through the entire subdivision. Four well known streets, from Division street, extend into the subdivision as far as

Grand avenue. They are well known, improved streets, with dwelling houses on each side of the same. They were paved, etc.

Thus the public, being shut out from the subdivision on Ohio street, in getting to California avenue from Western avenue, must go one mile out of its way. All the property south of Grand avenue and south of Ohio street is occupied by railroad tracks in the said subdivision.

There was no evidence to show that the city ever did anything to improve the balance of the streets in the balance of the subdivision. On account of this, the court held that those portions of the streets in the subdivision were not accepted, and gave title to the same to the private owners because they had occupied the premises for over twenty years.

In this case, a deed of vacation was properly filed under Chapter 109 of Hurd's Revised Statutes of Illinois before any effort was made to take possession of the streets by the city. None of the streets in that part of the subdivision were ever used; no act of the municipality could be shown that it intended in any way to accept the streets, the Santa Fe Railway was in the undisputed possession of the entire premises for over twenty-five years. It was clear from the facts in this case that it fell within the cases of *Moore v. City of Chicago*; *Casey v. City of Chicago*, and *Chicago, Milwaukee and St. Paul Railway v. City of Chicago*, *supra*, all very recent decisions. With these facts staring counsel for the city in the face, he fully realized that, if the case was continued to a final adjudication in the United States Court, the city would lose out just as it did in the foregoing cases.

Having the best interests of the city at heart, counsel proposed to the Santa Fe Railway Company that they dedicate the balance of Robinson street to the Drainage Canal and the balance of May street to the Drainage Canal, and a street intersecting these two streets, so that the public would have access to the Drainage Canal, which sometime might be an inland harbor, thus opening a way from Ashland avenue and 31st street, two of the greatest thoroughfares of the city.

In addition to that, counsel succeeded in getting the Santa Fe Railway to dedicate a subway for Robey street, from the West Fork of the South Branch of the Chicago river to 31st street. Between these two points in Robey street there never was a street and there never was a dedication. The proposed subway dedication is shown marked in brown on Exhibit "B" attached to the ordinance. The so-called streets laid out in 1853 undoubtedly, under the authorities cited, belonged to the Santa Fe Railway Company, as shown in Exhibit "A." If there was any chance for the Law Department to have succeeded in the final outcome of this case in the United States Court, we would never have urged the settlement herein provided for.

After the committee obtained a thorough understanding of the law and the facts with reference to those abandoned streets from the corporation counsel, and also from the superintendent of maps, it voted, with only one dissenting voice, at the last session of the committee, to recommend the ordinance for passage.

Respectfully submitted,

A. L. GETTYS,

Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,

Corporation Counsel.

Payment of License Fees in Installments.

May 26, 1915.

HON. CHARLES J. FORSBERG, City Collector.

Dear Sir:

You requested this department to advise you what disposition to make of \$50 which was deposited in your office by the Gorton National Detective Agency as part payment for a license to operate a detective agency during the year ending December 31, 1915.

The license fee to be paid by detective agencies is \$100. The Gorton National Detective Agency being unable to pay this sum, paid to the city collector on March 27, 1915, the

sum of \$50 as part payment, with the understanding that the unpaid portion of the fee, to-wit, \$50, was to be paid on April 25, 1915, on which date a license would be issued.

The detective agency did not pay \$50 on April 25, 1915, and now demands the return of its deposit of \$50 on the ground that the Supreme Court has declared the ordinance providing for the licensing of detective agencies invalid.

Section 759 of The Chicago Code of 1911, which relates to license fees to be paid by detective agencies, provides that:

“* * * each applicant, upon the payment in advance to the city collector of one hundred dollars, shall receive a license signed by the mayor and attested by the city clerk * * *.”

This ordinance cannot be construed as permitting the city collector, in his official capacity, to accept payments for licenses on the installment plan with the understanding that a license will issue when the payments equal the amount required to be paid under the ordinances. If the city collector collects payments in installments not authorized under the ordinances, he does so in the capacity of a private individual and not as city collector. The arrangement is purely a personal one between the person making the payment and the city collector, and the city has no claim on payments received in this manner. The \$50 paid by the Gorton Detective Agency cannot be regarded as money paid to the city, and we are of the opinion that this money may properly be returned to the Gorton Detective Agency.

We do not desire to be understood in this opinion that you may rightfully return money, by reason of the recent Supreme Court decision relating to this subject, to other detective agencies in cases where licenses have issued.

This opinion is based solely upon the facts submitted to us in regard to the claim for a refund by the Gorton National Detective Agency.

Yours very truly,

MAX M. KORSHAK,

Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,

Corporation Counsel.

Closing of Streets for Purposes of Play.

May 28, 1915.

C. C. HEALEY, ESQ., General Superintendent of Police.

Dear Sir:

In your communication of the 15th inst., you ask whether a street can be legally closed for the purpose of allowing the children to play therein.

In his communication, which is attached, the Rev. Mr. Dean calls attention to the fact that in his neighborhood on the West Side there is practically no play space accommodation, and he inquires whether certain blocks cannot be closed for a limited time after school, for the above purpose.

Our answer is that while the City Council has power to regulate the use of streets and to prevent and remove encroachments and obstructions upon the same, that body has no power to grant to individuals privileges or easements in them which interfere with their public use, even for so laudable a purpose as the one suggested.

The two charter powers here enumerated have frequently been construed in the above sense by our Supreme Court, and the only exception ever made by it is based upon the reasonable necessity of a property owner to the temporary use of a street in front of his premises for the purpose of loading or unloading merchandise.

An admitted exception arises when a street becomes unsafe or dangerous for public use. In such case the city authorities are warranted in closing the same until it may be used with safety.

There are only two methods known to our law whereby a public street may lose its character as such entirely or partially, namely:

1. The City Council may vacate in accordance with Chapter 145, Revised Statutes.

2. The City Council may, by ordinance, designate the whole or part of not to exceed two streets, etc., as a public driveway, to be used for pleasure driving only. In such case

funeral processions, hearses and traffic teams and vehicles may be excluded. (Sections 435-438, Ch. 24, Hurd's Revised Statutes, 1912.)

Very truly yours,

NICHOLAS MICHELS,

Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,

Corporation Counsel.

License Plates for Automobile Manufacturers.

May 28, 1915.

HON. CHARLES J. FORSBERG, City Collector.

Dear Sir:

You referred to this department the question whether a person who assembles automobiles is to be considered a manufacturer within the meaning of Section 2720 of The Chicago Code of 1911, which authorizes the issuance of as many duplicates of license plates as may be desired to a manufacturer who operates a manufacturing plant within the city, or whether such person is limited to the three license plates which other manufacturers and dealers are entitled to.

On this point you cite specifically the case of the Ford Company, which operates a plant within the City of Chicago for the purpose of assembling automobiles, the parts of same being manufactured elsewhere.

We are of the opinion that it was not the intention of the City Council to place so narrow a construction on the words "manufacturing plant within the city" as to exclude such a concern as this.

Authorities are not wanting to indicate that under certain conditions the word "manufacturer" is to be very strictly construed, although we find that in almost every instance where this is done some peculiar reason exists for such strict construction.

The most generally accepted definition of the word "manufacturer" is one engaged in making materials, raw or partly finished, into wares suitable for use. There are

numerous decisions which give this definition, based on Webster's Dictionary, Anderson's Law Dictionary and other standard dictionaries, among them being:

Chattanooga Plow Co. v. Hays, 125 Tenn. 148.

First National Bank of Richmond v. Trigg Co., 106 Va. 327.

In the case of *Chickasaw Cooperage Co. v. Police Jury*, 48 La. Ann. 523, the court held that one who sets up the component parts prepared for completing barrels is not a manufacturer. In that case the staves, heads and iron hoops for barrels were manufactured in another state and were shipped to Louisiana, where they were put together and given proper shape and finished. Upon an examination, however, it appears that the court was passing on the question of whether such a manufacturing enterprise was exempt from taxation under a law exempting the capital, machinery and other property employed in the manufacture of furniture and other articles of wood.

It will be seen from this that the question was narrowed down to a particular kind of manufacturing. The opinion of the court was based on the case of *Hartranft v. Wiegmann*, 121 U. S. 609. A reference to that case shows that shells gathered in foreign countries and treated by different processes, thereby being beautified and having inscriptions placed on same, did not fall within the definition of "manufacturers of shells," but came within the definition of "shells of every description, not manufactured." The court, in its opinion, said that the shells in question were still shells and the entire opinion is based on the fact that these shells "had not been manufactured into a new and different article having a distinctive name, character or use from that of a shell."

There are other authorities that could be cited to the effect that under a strict construction a manufacturer is a person who must either convert an article into something different, or combine materials so as to produce a new article.

While there is very respectable authority supporting this view, as indicated above, we are still of the opinion that none of the decisions that we have examined furnish a precedent

which must be followed in the present instance. The work of assembling the parts of a machine is one of the processes of manufacture. No one can be said to have manufactured an automobile until the parts have been assembled, any more than he could be said to have manufactured a watch until the different intricate mechanisms and delicate wheels and springs have been put together and adjusted and inserted in a case. If that is not done, the manufacturer could only be regarded as having manufactured the parts and not the thing itself. The assembling of the parts is not necessarily the last process of manufacture. It frequently happens that after the parts have been assembled the article is subjected to many other processes, such as dressing, finishing, painting, japanning, etc. We are not advised as to how much of the work of an automobile remains to be done after the assembling of the parts, but it is only reasonable to presume that there are finishing touches that must be applied which are not included in the mere work of assembling. We have reference to such work as filing uneven surfaces, polishing, etc.

We therefore believe that the plant in which automobiles are assembled and finished ready for the market is a "manufacturing plant." In fact, we are informed that there are some concerns which call themselves "manufacturers of automobiles" that buy parts from different manufacturers and put them together. Hence, the term may be regarded as established by usage as well as by a strict definition, and this should be taken into consideration in any interpretation of the ordinance in question. Moreover, there are fully as many authorities that could be cited to sustain this broader definition as there are sanctioning the narrower construction above indicated. Among them are the following:

Memphis Gas Light Co. v. State, 46 Tenn. 310.

Franklin Needle Co. v. Franklin, 65 N. H. 177.

Walker R. & H. Co. v. Merchant & Evans Co., 173 Fed. 771.

In passing laws which relate to manufacturing plants, it is the custom for the legislative body to make a precise definition. In such cases the definition in almost every instance

includes such a plant as the Ford plant, which you use as an example. (See Words & Phrases, Vol. 5, p. 4347.)

Our conclusion, therefore, is that a manufacturer who operates a plant in the city, regularly employing men for the purpose of assembling automobiles, is entitled to as many demonstrating license plates as may be desired at one dollar each.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,

Corporation Counsel.

Auctioneer's License Fee.

May 28, 1915.

MESSRS. FELSENTHAL & WILSON, Chicago Title & Trust Building, Chicago, Illinois.

Gentlemen:

We are in receipt of your letter of recent date, in which you state that among the concessions at White City is one which requires the services of an auctioneer during the period from June 1st to October 1st, and in which you ask whether an arrangement could be made by which such auctioneer could pay a license fee only for the time that his services are required.

We know of no way in which an auctioneer's license could be legally issued on the first day of June for any other sum than the full license fee of \$300. You are mistaken when you say that the license fee is divided into semi-annual payments of \$150 each. The ordinance in question, which is part of Section 123 of The Chicago Code of 1911, reads as follows:

“All such licenses shall expire on the thirty-first day of December after their issuance; provided, however, that if less than six months of the annual license period shall

have expired at the time of the issuing of such license, the full license fee shall be charged therefor. If six months or more than six months of the annual license period shall have expired, and if it appears that the applicant has not engaged in the business of an auctioneer within six months prior to the application for a license therefor one-half of the full license fee shall be charged."

You will note from the above that any application that is made before the first of July calls for the payment of the full \$300, and that it is only in case an application is made after the first of July that a fee for the half-year could be accepted. There is no discretion vested in any officer of the city which would warrant a departure from this provision of the ordinance.

Under Section 130, however, such licensee is entitled to one change of location for his business during the license period. This would enable the auctioneer at White City to transfer his business to some other place at the close of the entertainment season in case he makes proper application for a transfer.

We do not regard the point which you make in your letter concerning the business of such auctioneer being open only to the patrons of White City who pay admission as entitled to much consideration. While the license authorizes an auctioneer to sell "at public auction," it can not be said that an auction carried on in a public place of this character is other than a public auction, even though an admission fee may be charged.

We are, therefore, of the opinion that the auctioneer, of whom you speak, must pay the full annual license fee, if he obtains his license at any time before July 1st.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,

Corporation Counsel.

Right of Park Commissioners to Give Frontage Consents.

June 1, 1915.

HON. HENRY D. CAPITAIN, Chairman, Committee on Local Transportation.

Dear Sir:

In your letter of May 28, 1915, addressed to Richard S. Folsom, Corporation Counsel, you enclose a copy of frontage consent, for the construction of a street railway line in Chicago avenue by the Chicago Railways Company, given by the Commissioners of Lincoln Park, and ask for an opinion as to whether the Commissioners of Lincoln Park have the power to sign this consent.

Replying thereto, we beg to state that we are of the opinion that the Lincoln Park Commissioners are regarded under the law the same as other abutting owners of property, and that as such owners the Commissioners of Lincoln Park have the power to sign a frontage petition in the same manner as any other abutting owner of property.

Theurer v. People, 211 Ill. 296.

Paterson R. R. Co. v. Mayor, 24 N. J. Eq. 158.

Dexter v. Sprague, 22 R. I. 324.

Yours truly,

M. M. KORSHAK,

Assistant Corporation Counsel.

Approved:

BRYAN Y. CRAIG,

Acting Corporation Counsel.

Application of the Village of Forest Park for City Water.

June 1, 1915.

HON. WILLIAM R. MOORHOUSE, Commissioner of Public Works.

Dear Sir:

In reply to your letter of May 25, 1915, asking to be advised whether the City of Chicago is obligated to furnish a

supply of water to the Village of Forest Park, under the Sanitary District Act, said Village of Forest Park having made application to the City of Chicago for the same, we beg leave to advise you as follows:

Section 369n of Chapter 24 of Hurd's Revised Statutes of 1913, prescribes and describes the boundaries of the Sanitary District of Chicago as follows:

"369n. CORPORATE LIMITS EXTENDED.) §1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly.* That the corporate limits of The Sanitary District of Chicago are hereby extended so as to embrace and include within the same, the territory and tracts of land situated in the County of Cook and State of Illinois, hereinafter described as follows:

"Sections Twenty-one (21), Twenty-two (22), Twenty-three (23), Twenty-six (26), Twenty-seven (27), Thirty-five (35), and Thirty-six (36) in Township Forty (40) North, Range Twelve (12) East of the Third Principal Meridian; Sections One (1), Two (2), Three (3), Four (4), Nine (9), Ten (10), Eleven (11), Twelve (12), Thirteen (13), Fourteen (14), Fifteen (15), Sixteen (16), Twenty-two (22), Twenty-three (23), Twenty-four (24), Twenty-five (25), Twenty-six (26), Twenty-seven (27), Thirty-five (35) and Thirty-six (36) in Township Thirty-nine (39) North, Range 12, East of the Third Principal Meridian, in the County of Cook and State of Illinois; and in addition thereto any portion or portions of the incorporated villages of Franklin Park, River Grove, Melrose Park, Maywood, River Forest, *Forest Park*, Riverside and Bellewood, which may not be included in the above description."

From the map of the Sanitary District of Chicago hereto attached, and from the legal description above quoted, it is clear that the whole of the Village of Forest Park is within the Sanitary District of Chicago.

Section 368 of Chapter 24 of Hurd's Revised Statutes of the State of Illinois, with reference to the obligation of the City of Chicago to furnish a supply of water to adjoining cities, towns and villages, etc., is as follows:

"368. WHEN CITY OR VILLAGE OWNS WATER WORKS, ETC.) §26. Whenever in any such

sanitary district there shall be a city, incorporated town or village, which owns a system of waterworks and supplies water from a lake or other source which will be saved and preserved from sewage pollution, by the construction of the main channel, drain, ditch or outlet herein provided for, and the turning of the sewage of such city and district therein, and there shall be in such sanitary district *any territory bordering* on any such city, incorporated town or village within the limits of another city, incorporated town or village, which does not own any system of waterworks, at the time of the creation of such sanitary district, then upon application by the corporate authorities of such latter named city, incorporated town or village the corporate authorities of such city, incorporated town or village having such system of waterworks shall furnish water at the boundary line between such municipalities by means of its waterworks to the corporate authorities asking for the same, in such quantities as may be required to supply consumers within said territory, at no greater price or charge than it charges and collects of consumers, within its limits for water furnished through meters in like large quantities."

In the case of *People ex rel. Village of Burnham v. City of Chicago*, 146 Ill. App. 623, wherein a petition for mandamus was filed by the Village of Burnham to compel the City of Chicago to furnish water to said village, it appears that three things, in general, are necessary to the establishment of this right, as follows:

First. That the city, town or village making application for water to the City of Chicago does not and did not at the time of the creation of the Sanitary District of Chicago, own a system of waterworks of its own.

Second. That the city, town or village making such application shall be a part of the Sanitary District of Chicago, and that the whole of such city, town or village, or a part thereof, shall *border* upon the city limits of the City of Chicago.

Third. That the city, town or village making such application shall have the means of caring for, conserving and distributing such supply of water when delivered.

In our opinion, the inability of any city, town or village

making application to the City of Chicago for water to establish any one of these three necessary elements, defeats its right to invoke the aid of Section 368.

According to the Century Dictionary, the word "border" means

"to lie on the border of; be contiguous to; adjoin; lie next."

Inasmuch as the Village of Forest Park does not *border* on the city limits of Chicago, or, in other words, is not contiguous to and does not adjoin the city limits of the City of Chicago, we are of the opinion that the Village of Forest Park does not come within the statute as required by its provisions, and that it is not at the present time in a position to make application for city water, and therefore its application must be denied.

Respectfully submitted,

J. J. VITERNA,

Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,

Corporation Counsel.

Proposed Ordinance Requiring Hotels, Lodging Houses and Hospitals to Employ Night Watchmen.

June 2, 1915.

HON. JOHN SIMAN, City Clerk.

Dear Sir:

We have your letter of the 26th ult., in which you ask us to render an opinion as to whether the City Council has power to pass the ordinance, a copy of which you attach to this letter.

The proposed ordinance requires any person, firm or corporation conducting or having charge of any hospital, hotel or lodging house, which is more than two stories in height and has sleeping accommodations for twenty or more persons on any floor above the second, within the City of Chicago, to

employ a night watchman between the hours of 10 o'clock p. m. and 6 o'clock a. m. The provisions of the proposed ordinance, following those just quoted, make it plain that the object is to protect the people sleeping in such buildings against the dangers of fire.

The Supreme Court of this state has frequently decided that a municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessary to or fairly implied in or incident to the powers expressly granted; third, those essential to the declared object and purposes of the corporation, not simply convenient but indispensable. Any fair, reasonable doubt, concerning the existence of the power, is resolved by the courts against the corporation and the power is denied.

This rule has become so far axiomatic as not to need the citation of authority. The statement of the rule just given is taken from the opinion in the case of *Chicago v. Weber*, cited below, pp. 307-308. Authorities in support of the rule will be found on page 308 of this opinion as well as upon page 575 of the opinion in the case of *Chicago v. Pettibone Company*, also cited below.

The Supreme Court has had occasion to decide regarding the powers expressly or impliedly given to cities by the Cities and Villages Act for directing precautions to be taken against fire in the following cases:

Chicago v. Weber, 246 Ill. 304.

Chicago v. Mandel Bros., 264 Ill. 206.

Chicago v. Pettibone Co., 267 Ill. 573.

In the first of these cases the court held that the city did not have power to compel theater owners to employ and pay a city fireman to be present at each performance as a precaution against fire. The question whether such a power could be held to be implied in the general grant of police power made by Subsection 66 of Section 1 of Article V of the Cities and Villages Act is fully discussed in the opinion in this case. (pp. 309-311.) In this discussion it seems to be assumed as

a matter of course that the city could not impose such a burden upon private owners of buildings.

In the case last cited above the court held that a city had no power to pass an ordinance requiring an employer to train his employes to avoid dangers from fire by means of fire drills and to equip his building with a fire alarm system for such drills.

On the other hand, in the second of the three cases cited above, the court held that reasonable requirements for the protection of the lives and safety of the citizens, as well as their property, from destruction by fire, are clearly within the police power which may be exercised by a city; and that, in the exercise of such general police power, the city could by ordinance prohibit the sale of goods at retail in sub-basements of department stores, such prohibition being in the nature of a police regulation to protect the public against danger from fire in places where people are likely to assemble in great numbers.

The decision in the Mandel Brothers case does not purport to overrule the decision in the Weber case; and the decision in the former case is not necessarily inconsistent with that in the latter case; although some of the reasoning in the Mandel Brothers case does seem to be inconsistent with some of the reasoning in the Weber case.

The Weber case comes as near to being a direct authority upon the question which you put to us as one could well expect to find.

We may further note that the powers for compelling precautions against fire given to the City Council by Sections 61 to 65, inclusive, of Section 1 of Article V of the Cities and Villages Act (Session Laws 1911, pp. 177-178) certainly do not either expressly or by necessary implication, confer the power to compel the owner of a hospital, hotel or lodging house to keep and pay a night watchman.

Upon the whole we feel constrained by the decisions of the Illinois Supreme Court above cited or referred to, to

advise you that the city has not the power to pass the ordinance in question.

Yours respectfully,

WILLIAM DILLON,

Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,

Corporation Counsel.

Refund of License Fees.

June 2, 1915.

HON. E. R. PIKE, City Comptroller.

Dear Sir:

I have before me a typewritten list, handed by you to me, indicating the names of persons or corporations who have paid money to the city for saloon licenses, but who, for some reason or other, in most instances have not taken out the licenses applied for.

Replying to your verbal request concerning the rights of such persons to have returned to them the money so paid to the city, I advise you that such payments must be regarded as having been voluntarily made, and, in the absence of some fault on the part of city officials, the city is under no obligation to return said moneys to the persons paying the same.

In cases where the city refuses to grant the application for a license the applicant is undoubtedly entitled to the return of his money, but where, for instance, the applicant neglects to designate the location of the dramshop for the conduct of which a license is applied for, a contrary rule prevails. Again, where a license is revoked, the licensee is not entitled to the return of any or all of the license fee paid. Authority for the conclusions here stated will be found in:

City v. Burke, 226 Ill. 191.

Yates v. Royal Ins. Co., 200 Ill. 202.

Otis v. People, 196 Ill. 542.

Village v. Knopf, 199 Ill. 444.

It would seem that, as the city ordinances now stand, an applicant for a license who has failed to designate the place where he proposes to conduct the dramshop for which he seeks the license might, at any time within the license period for which the incomplete application for the license was made, complete his application by stating the place where he proposes to conduct the dramshop, and thereby obtain a license for the uncompleted portion of the license period in question.

If it is desired that it be impossible to hold licenses open indefinitely during the license period, the ordinances should be so amended as to require applicants for licenses to fully comply with the requirements concerning applications within a limited period, say, fifteen days from the first day of a license period, so that the right of the applicant to a license would lapse with the expiration of such fifteen-day period.

Yours very truly,

CHARLES M. HAFT,

Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,

Corporation Counsel.

Validity of Vacation of Alley.

June 4, 1915.

JOHN D. RILEY, Esq., Superintendent of Maps.

Dear Sir:

Your favor of May 24, in regard to the validity of the purported vacation of an alley recorded May 19, 1915, as Document Number 5637023 was duly received.

It appears from information furnished by you that John Wojnowski and S. Wojnowski are the owners of all of the lots in the resubdivision of lots 43 to 48, both inclusive, in Block 34 in Hill's Addition to South Chicago, also of Lot 42 in Hill's Addition to South Chicago; said Lot 42 adjoins the alley which is to be vacated, the said alley being in the resubdivision described and is the south sixteen feet of what

was Lot 43 in Block 34 in said Hill's Addition; that said alley has never been worked or improved in any way by the city nor was it ever used or traveled by the public and has always been fenced and is now being used as a sort of summer garden; that there never has been any formal acceptance by the City of Chicago of the same, and that the only thing the city has done is to record and approve the plat of the re-subdivision showing the alley in question; that certain parties in Hill's Addition, but whose property does not adjoin the alley, are objecting to the vacation thereof.

The question under the above statement of facts is, can the parties hereto vacate an alley dedicated to the city by the filing of a declaration of vacation?

It needs no citation of authorities to state that if there was a complete dedication and said alley was accepted and used by the city, the parties by their own declaration of vacation would not have the right to close or obstruct it.

Our Supreme Court, in passing on the question of what constitutes a complete dedication, in the case of *Little v. The City of Lincoln*, 106 Ill. 353, at page 368, said:

"The general doctrine has been repeatedly recognized by this court, that to constitute a complete dedication there must be an acceptance. It is not essential that there should be any prescribed formal act of acceptance, but there must be user or some other act indicating acceptance by those authorized in such matters to represent the public, to complete the dedication."

The recording and approving of the plats showing the alley to be dedicated was not an acceptance. In *Hewes v. Village of Crete*, 175 Ill. 348, the court held:

"It is the settled doctrine in this state that, notwithstanding the making, acknowledging and recording of a plat showing the streets therein intended to be dedicated, as required by the statute, the fee of the streets does not vest in the municipality until the acceptance thereof."

This being the only thing done by the city, and there being nothing in the statement of facts furnished by you which in my opinion would constitute a user, the dedication

was not complete, and the parties could at any time vacate the alley shown in the plat by complying with Sections 6 and 7 of Chapter 109 of Hurd's Revised Statutes of Illinois, which they have done in this case. The sections are as follows:

"OF ENTIRE PLAT.) §6. Any such plat may be vacated by the owner of the premises at any time before the sale of any lot therein, by a written instrument declaring the same to be vacated, executed, acknowledged or proved, and recorded in like manner as deeds of land; which declaration being duly recorded shall operate to destroy the force and effect of the recording of the plat so vacated, and to divest all public rights in the streets, alleys and public grounds, and all dedications laid out or described in such plat. When lots have been sold, the plat may be vacated in the manner herein provided by all the owners of lots in such plat joining in the execution of such writing."

"OF PART OF PLAT.) §7. Any part of a plat may be vacated in the manner provided in the preceding section, and subject to the conditions therein prescribed: *Provided*, such vacation shall not abridge or destroy any of the rights or privileges of other proprietors in such plat: *And, provided*, further, that nothing contained in this section shall authorize the closing or obstructing of any public highway laid out according to law."

The sections above quoted require only the concurrence of all the owners within the plat to be vacated. The parties who are objecting to the vacation of the alley in question, I am informed, are proprietors of other lots in Hill's Addition, but not in the new resubdivision or of lots adjoining the alley to be vacated, nor to whom said alley offers a means of access or egress to or from their property.

Our Supreme Court said, in *Chicago et al. v. Union Building Association*, 102 Ill. 379:

"The rights and privileges of other proprietors in the plat which the statute protects are necessarily legal rights and privileges and such parties cannot therefore be affected by the closing of streets not adjacent to their property nor directly affording access thereto or egress therefrom."

In this case the owners of all of the lots in the resubdivision, who are also the owners of the lots adjoining the alley

to be vacated, asked to vacate the same, and no concurrence of others is necessary.

We, therefore, advise you, that in our opinion the said vacation is valid.

Very respectfully,

LEON EDELMAN,

Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,

Corporation Counsel.

Rights of City Council with Respect to Board of Education.

June 3, 1915.

HON. WILLIAM HALE THOMPSON, Mayor.

Dear Sir:

We beg to submit the following in reply to your verbal request for an opinion upon the points hereinafter considered:

First. Has the City Council the right to require the Board of Education to submit its account books and financial records to an examination by the City Council, by virtue of those provisions of the School Act of 1909 which relate to reports by the board to the City Council?

The provisions in respect to reports by the Board of Education appear in Section 134 of the School Act of 1909, which section states the duties of the board. They are as follows:

“Twelfth. To report to the City Council, from time to time, any suggestions they may deem expedient or requisite in relation to the schools and the school fund, or the management thereof, and generally to recommend the establishment of new schools and districts.

“Thirteenth. To prepare and publish an annual report, which shall include the receipts and expenditures of each school, specifying the source of such receipts and the object of such expenditures.

“Fourteenth. To communicate to the City Council, from time to time, such information as may be required.”

It will be observed that the twelfth paragraph merely makes it the duty of the board to make suggestions to the City Council upon the subjects mentioned therein, and that the thirteenth paragraph makes it the duty of the board to publish an annual report which shall include the receipts and expenditures of each school.

There is nothing in either of these paragraphs which would afford any basis for a claim of right on the part of the City Council to examine the financial records of the board.

The fourteenth paragraph makes it the duty of the board to communicate to the City Council, from time to time, such information as may be required. This paragraph contemplates the communication of information by the board, and does not contemplate or provide for an examination of the board's records by the City Council. If the board should refuse to communicate information in its possession which should be required by the City Council, an action would doubtless lie to compel the board to comply with this duty.

We are of the opinion that the provisions of the School Act relative to reports by the School Board to the City Council, whether considered separately or together, do not either expressly or inferentially give the City Council the right against the wishes of the board to examine its financial records.

Second. Has the City Council the right to require the Board of Education to submit its account books and financial records to an examination by the City Council, by virtue of those provisions of the School Act of 1909 relating to the erection and purchase of schoolhouses and the purchase or leasing of sites for schoolhouses, and the title to and sale of real estate used for school purposes or held in trust for schools.

Section 132 of said School Act provides that the Board of Education in cities having a population exceeding one hundred thousand inhabitants shall have power with the concurrence of the City Council:

“First. To erect or purchase buildings suitable for school houses, and keep the same in repair.

“Second. To buy or lease sites for schoolhouses with the necessary grounds. If the board of education shall be unable to agree with the owner or owners for the purchase of such site, then, with the concurrence of the City Council, it may acquire the title to such site in the manner provided by law for the exercise of the right of eminent domain. Such proceedings to condemn shall be in the name of the city in trust for the use of schools.

“Third. To issue bonds for the purpose of building, furnishing and repairing schoolhouses, for purchasing school sites, and to provide for the payment of such bonds; and to borrow money for school purposes upon the credit of the city.”

Section 136 of the School Act is as follows:

“All conveyances of real estate shall be made to the city and the title of all property acquired by condemnation shall be vested in the city, in trust for the use of schools, and no sale of real estate or interest therein used for school purposes or held in trust for schools shall (be) made, except by the City Council upon the written request of the Board of Education.”

The School Act further provides (Section 137) that all moneys raised or received from any source for school purposes shall be held by the city treasurer as a special fund for school purposes, subject to the order of the Board of Education, upon warrants to be countersigned by the mayor and city comptroller.

Our Supreme Court has held that the Board of Education is an organization which in some points of view is to be regarded as a subordinate department of the city government and in others as an independent municipal corporation. *McGurn v. Board of Education*, 133 Ill. 122, 134; *Brenan v. People*, 176 Ill. 620, 628; *People v. City of Chicago*, 227 Ill. 445, 447; *People v. Healy*, 231 Ill. 629, 638.

It is the Board of Education that orders and makes the expenditures which are paid for out of the school fund. It is, therefore, necessary for the board to keep account books or other financial records. These books and records are the books and records of the board, and, we believe, are subject to its exclusive control.

The above quoted provisions of the School Act in respect

to reports and communications by the board clearly contemplate that the financial records shall be kept and controlled by the board in its capacity as an independent body, and that the city should procure such information as it may require from such reports and communications of the board and from the warrants presented by the board for countersigning by the mayor and city comptroller.

The city treasurer holds the school funds subject to the order of the board, upon warrants to be countersigned by the mayor and city comptroller. The mayor and city comptroller may and should refuse to countersign a warrant if the expenditure is not for a school purpose, or if the total warrants exceed the school fund.

The above quoted provisions of the School Act in respect to the erection and purchase of school houses, school sites, etc., make it impossible for the board to exercise the powers therein mentioned except with the concurrence of the City Council, but we find nothing therein which would give the City Council the right to examine the account books of the board showing expenditures connected with purchases of school buildings, school sites, etc., in regard to which purchases the City Council had concurred with the board.

We are of the opinion that the above quoted provisions of the School Act in respect to the powers which can be exercised by the board only with the concurrence of the City Council, do not give the City Council the right against the wishes of the board to examine its financial records.

Third. If the City Council has the right to compel a submission of the books of the Board of Education for examination by the City Council, an order of the City Council directing such examination and requiring the board to submit its books for such examination would have to be passed and the board refuse to comply therewith before court action against the board would lie. The action would be mandamus to compel the board and its members to submit the financial records for examination by the City Council. The writ of mandamus is awarded only where the party applying for it shows a clear legal right to have the thing sought by it done. The

writ will not be awarded in a doubtful case. *People v. Brentano*, 259 Ill. 359, 368.

Yours respectfully,

BRYAN Y. CRAIG,
First Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,
Corporation Counsel.

Wires of Telegraph Company Installed on Elevated Railroad Structures.

June 3, 1915.

HON. RAY PALMER, Commissioner of Gas and Electricity.

Dear Sir:

We are in receipt of your communication of the 26th ult., requesting an opinion in regard to whether a charge can lawfully be made by the city for wires of a telegraph company installed on an elevated railroad structure where such elevated railroad structure occupies a public street of the City of Chicago—for instance, under the Lake Street Elevated Railroad.

Section 4 of an act of the Legislature, entitled “An Act to revise the law in relation to telegraph companies,” in force July 1, 1874, provides that no telegraph company shall erect any poles, posts, piers, abutments, wires or other fixtures of their lines upon any street, alley or other highway or public ground within any incorporated city, without the consent of the corporate authorities of such city.

In the case of *City of Springfield v. Postal Telegraph Company*, 253 Ill. 346, our Supreme Court, after referring to said Section 4, stated that legislative sanction directly given or conferred through municipal action was necessary to authorize the use of streets for posts or wires of telegraph companies and that municipalities under such legislative authority may demand reasonable compensation for space in the streets exclusively appropriated by telegraph companies with-

out in any way conflicting with the Act of Congress of 1866, as amended in 1884, with reference to telegraph companies using public highways and streets.

We are of the opinion that the city may make a reasonable charge for the wires of a telegraph company installed on an elevated railroad structure and running along and over a public street.

Yours truly,

BRYAN Y. CRAIG,

First Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,

Corporation Counsel.

Right of City to Require Public Utility Company to Remove Poles Interfering with Use of Adjoining Property.

June 3, 1915.

HON. JOHN P. GARNER, Commissioner of Public Service.

Dear Sir:

We have a communication of the commissioner of public service of the 24th ult., relative to complaints made to your department concerning the location of Commonwealth Edison Company's poles in alleys which prevent the use of their premises by adjoining owners. The letter states that "the Edison Company states it will not remove these poles or change their location in the alleys unless they are reimbursed for the expense of such work. The Department of Gas and Electricity advise that, in issuing permits for the construction of pole lines in alleys to the Edison Company, the position of the separate poles is not specified, such permit giving the Edison Company the right to erect poles and string wires in the alley only, and thus the location of the poles themselves is within the option of the company," and asks for an opinion of the corporation counsel as to the procedure the Department of Public Service should follow to secure the

removal of poles when placed so that they block the entrance to buildings.

The Commonwealth Edison Company is operating under the ordinance granted to it March 23, 1908, the same being an amendment of the ordinance of June 28, 1897. Section 6 of the ordinance permits the continuance and use of overhead electric lines consisting of poles, overhead wires and cables, until otherwise required by the City of Chicago, which the company at the time of the passage of the ordinance had in certain parts of the city therein designated (Village of Hyde Park and the Town of Lake) and which had been constructed in said territory under the authority of ordinances granted by the Village of Hyde Park and by the Town of Lake, and is, in part, as follows:

“But whenever the City of Chicago shall order any of said overground construction removed from any particular street or streets, alley or alleys or other public place or places in said territory, the same shall be promptly removed by said company.”

Section 7 of said ordinance is, in part, as follows:

“Neither the passage of this ordinance nor anything contained in it shall in any way limit or affect the exercise by the City of Chicago at any time hereafter of such rights and powers as it now has, or may hereafter acquire in respect to passing from time to time proper and reasonable general ordinances for the location, the extension, the maintenance, the use, the regulation and the inspection of electrical construction and equipment.” (Volume 2, Council Journal 1907-1908, Sections 6 and 7, page 4673.)

Section 2500 of The Chicago Code of 1911, which is substantially a re-enactment of Section 2166 of the Revised Municipal Code of Chicago of 1905 and of Section 1902 of the Revised Code of Chicago of 1897, as amended by ordinance of July 21, 1913, provides:

“No person or corporation shall erect, construct, maintain or use any pole, line or wire, or electric conductor of any description whatever within the city, without first having obtained a permit therefor under a valid and existing ordinance from the commissioner of public works, which permit shall be countersigned by the city electrician.”

Section 2503 of The Chicago Code of 1911, which is substantially a re-enactment of Section 2169 of the Revised Municipal Code of Chicago of 1905, is, in part, as follows:

“No permission or authority shall be given to any person or corporation to erect any pole or poles, for telegraph, telephone or electric light or power purposes, or for the purpose of stringing thereon wires, cables or conveyors for the transmission of sound or signal or of heat, light or power upon or along any street, alley or public way, within the present city limits, *except upon the express provision that such poles and conductors are to be and will be removed forthwith whenever the City Council shall order such removal.*”

We are therefore of the opinion that, pursuant to the foregoing provisions of the ordinances, as well as by virtue of its police power, the city may require the Commonwealth Edison Company to remove the poles in the cases under consideration. The method of procedure must be by authority and order of the City Council.

Yours very truly,

GEORGE B. O'REILLY,
Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,
Corporation Counsel.

Termination of Contract with City When Goods Can Not Be Imported Because of European War.

June 4, 1915.

HON. JOHN DILL ROBERTSON, Commissioner of Health.

Dear Sir:

We have your communication of the 26th ult., addressed to the corporation counsel, with reference to a contract between Messrs. Woldenberg & Schaar and the city to furnish the Department of Health with glassware amounting to

\$909.25. Because of the European war, date of delivery of the goods was extended to June 30, 1915. The contractor has informed you that he will be unable to furnish the balance of the material and cannot promise to make deliveries at any future specified time, because it will be impossible to import such merchandise from Germany until the blockade has been lifted.

You say that the conditions of the trade are such that the articles of glassware required to be furnished in this contract cannot be procured anywhere except in Germany. There remains about twenty per cent of the material to be furnished still undelivered. You ask to be informed if under the circumstances the contract may be terminated and the contractor paid the fifteen per cent reserve which the city is retaining on the amount previously delivered.

The existence of the European war, there having been no change in the political situation of the United States with any of the powers involved, is not a sufficient legal reason for the avoidance of a contract. *Atkinson v. Ritchie*, 10 East. 530; Addison on Contracts (9th Ed.), 132.

Clause 9 of the specifications forming a part of the contract in question reads as follows:

“Should the contractor fail to deliver the goods as herein specified, the commissioner of health, at his option, may cancel the then unexpired portion of the contract, or he may purchase supplies in the open market, in which case, all costs and expenses in excess of the price bid shall be borne and paid for by the said contractor.”

Pursuant to the foregoing provision of the contract you are at liberty to cancel the unexpired portion of the contract, or, you may go into the open market and purchase supplies in lieu of those not delivered, and charge all costs and expenses above the amount called for in the contract, should the goods cost you more than the price contracted for, to the contractor.

The foregoing clause makes it optional with the commissioner of health which course to pursue. We think it advis-

able that you notify the contractor whatever course you may elect.

Very truly yours,

GEORGE B. O'REILLY,
Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,
Corporation Counsel.

Care of Prisoners Brought to Court and Awaiting Trial.

June 8, 1915.

HON. C. C. HEALEY, General Superintendent of Police.

Dear Sir:

Your office transmitted to us copy of a letter received from Anton J. Cermak, Bailiff of The Municipal Court of Chicago. Mr. Cermak has requested you to secure an opinion from our department as to whose duty it is to take charge of prisoners in the "bull pen" who are awaiting trial.

Mr. Cermak states in his letter that at one time the Police Department detailed a matron to take care of the female prisoners and a man to take care of the male prisoners in the "bull pen" of the Court of Domestic Relations.

Mr. Cermak complains that the persons detailed to take care of such male and female prisoners have been removed, and desires to know whether it is the duty of the police or the bailiff to take care of prisoners in the "bull pen" who are awaiting trial for criminal violations.

Whether it is the duty of the police or the duty of the bailiff of The Municipal Court depends on whether the prisoners in the "bull pen" are in the custody of the police or the bailiff. If the prisoners in the "bull pen" are still in the custody of the police, then it is the duty of the Police Department to guard over said prisoners. On the other hand, if the prisoners are in the custody of the bailiff, then it is the duty of the bailiff to maintain guard over the prisoners.

The duties of the bailiff of the Municipal Court are defined in Section 16 of the Municipal Court Act. Said Section 16 provides, in part, as follows:

“He (bailiff) shall perform with respect to said Municipal Court the duties usually performed by sheriffs in respect to attendance upon, and service and execution of the process, and obedience of the lawful orders and directions of, a circuit court.”

Section 17 of the same act provides, in part, as follows:

“The bailiff and deputy bailiffs of the Municipal Court shall be *ex officio* police officers of the City of Chicago.”

Under the above provisions there is no question but that the bailiff or deputy bailiffs of the Municipal Court are clothed with powers to make arrests, either with or without warrants, the same as police officers. If arrests are made by the bailiff or deputy bailiffs, then it is the duty of such bailiff or bailiffs to guard prisoners in the “bull pen” who are awaiting the disposition of their cases by the court.

As a matter of fact, however, arrests, either with or without warrants, are not ordinarily made by the bailiff or deputy bailiffs, but they are made by the police officers. This practice is sanctioned by another provision contained in the above Section 17 of the Municipal Court Act, which provides in part as follows:

“Every police officer of the City of Chicago shall be *ex officio* a deputy bailiff of the Municipal Court, and shall perform, from time to time, such duties in respect to cases within the jurisdiction of said court as may be required of him by said court or any judge thereof.”

Where an arrest is made by a police officer, either with or without a warrant, the custody by the officer of the prisoner does not cease until the prisoner has been discharged, admitted to bail or committed to jail upon a *mittimus* issued by a court.

Voorhees on Law of Arrest in Civil and Criminal Actions, 1915 Ed., par. 206.

3 Cyc. 895.

See also the 4th clause of Section 49 of the Municipal Court Act, which relates to arrests by police officers on view.

We are, therefore, of the opinion that where arrests are made by police officers, either with or without warrants, it is the duty of such police officers to guard their prisoners while such prisoners are waiting for the trial of their cases. If the prisoners are confined in the "bull pen" it is still the duty of the police to guard such prisoners, and to this end a police officer may be designated to watch several prisoners. Holding, as we do, that the prisoners in the "bull pen" are the prisoners of the police, then the Police Department was not justified in removing its attendants in charge of the male and female prisoners in the "bull pen" of the Court of Domestic Relations.

We do not desire to be understood, by reason of anything hereinabove stated, as holding that the bailiff of the Municipal Court has no power to relieve the police officers of the custody of the prisoners before such prisoners are discharged, admitted to bail or committed. As hereinabove shown, the bailiff and deputy bailiff are made by statute *ex officio* police officers of the City of Chicago. A policeman is justified in turning over prisoners, arrested either with or without warrants, to the bailiff or deputy bailiffs of the Municipal Court if such bailiff or deputy bailiffs accept the responsibility and receipt for such prisoners.

In other words, there is no legal obstacle preventing a bailiff from assuming the responsibility for prisoners in the "bull pen", and if the bailiff or deputy bailiffs assume the obligation to guard such prisoners the officer will be relieved from any further responsibility with reference to such prisoners. But, until so relieved by the bailiff or deputy bailiffs of the Municipal Court, or by another proper officer, it is the duty of the police officer to continue his custody of the prisoner or prisoners.

In short, there is no legal obstacle to prevent the bailiff of the Municipal Court, if he has sufficient deputy bailiffs at his disposal, to make an arrangement with the Police Department whereby deputy bailiffs shall be stationed as guards over the prisoners in the various "bull pens" in the city. Until such an arrangement is made, however, it is the duty

of the Police Department and not of the bailiff, to delegate persons to guard the prisoners in the "bull pens" throughout the city.

Yours very truly,

M. M. KORSHAK,
Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,
Corporation Counsel.

Arrests of Youthful Offenders.

June 10, 1915.

HON. WILLIAM HALE THOMPSON, Mayor.

Dear Sir:

Word was conveyed to us that you desire information concerning the necessity of arresting youthful offenders who are brought before what is known as the "Boys Court." These are boys too old to be sent to the Juvenile Court, yet in most instances are guilty of only minor offenses; and the question is whether they can be dealt with in such a way as to avoid subjecting them to arrest in cases where they are innocent or are charged with such petty offenses that they are allowed to go after being censured by the court.

There need be no difficulty about the matter if the offense is a violation of an ordinance or other *quasi-criminal* offense as distinguished from a statutory misdemeanor.

The Municipal Court Act (Section 49) contemplates that in *quasi-criminal* cases other than bastardy cases the defendant should be served with summons, and that if he fails to appear in response to same the court may proceed as in case of default or may issue a warrant. A warrant may, however, be issued in the first instance upon complaint supported by affidavit to the effect that the person making the complaint has reasonable grounds to believe that the party charged is guilty and will escape unless arrested and stating the facts upon which such belief is based. A warrant will also issue

where the complaint shows that the offense constitutes in whole or in part a violation of the criminal code. Provision is further made for the arrest on view, of a person violating an ordinance, by a police officer, when he sees the offense committed; but this is not obligatory, and the officer may serve summons in place of making the arrest if that method should be determined upon.

It will be seen from the above that there need be no arrests made in the first instance, unless it is believed that the defendant will escape, in cases that fall short of being a statutory misdemeanor. In the latter class of cases the law requires the arrest of the offender as soon as the complaint has been passed on by the judge or when an officer sees the offense committed.

It is true that at present violators of the speed laws are permitted to go upon notice to appear in court. This method of making arrests was agreed upon in response to the wishes of the City Council. It is of doubtful legality. The person so arrested and notified is in contemplation of law under arrest. If it is found desirable to extend this system so as to include other offenses against the statutes we recommend that the matter be taken up with the chief justice of the Municipal Court. Otherwise a policeman who fails to take a person into custody when a statutory misdemeanor has been committed will subject himself to censure.

It is however, as indicated above, purely a question of administrative policy so far as city ordinances or ordinances of other municipalities are concerned. If it is deemed advisable to instruct the police to serve summons, and avoid making arrests except in extraordinary cases or cases where the criminal code has been violated, that can lawfully be done.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

BRYAN Y. CRAIG,
First Assistant Corporation Counsel.

Power to Prescribe Qualifications to be Possessed by the Drivers of Private Motor Vehicles.

June 10, 1915.

HON. JOHN TOMAN, Chairman, Committee on License.

Dear Sir:

We have a communication of the 22nd ult., of the city clerk, addressed to the corporation counsel, saying that at a meeting of the Committee on License held May 20, 1915, he was directed to request the corporation counsel "to advise the said committee as to the power of the City Council to prescribe qualifications to be possessed by the drivers of private motor vehicles and to enforce an ordinance prohibiting any person, owner or otherwise, to drive a private motor vehicle on the streets of Chicago unless he shall have demonstrated that he is possessed of the qualifications so prescribed."

The state law, approved June 10, 1911, in force July 1, 1911, provides for the registration of motor vehicles and uniform rules regulating the use and speed thereof.

Section 12 of said act is as follows:

"LOCAL ORDINANCES PROHIBITED.) No owner of a motor vehicle, except motor trucks and motor-driven commercial vehicles * * * who shall have obtained a certificate from the Secretary of State * * * shall be required * * * to obtain any other license or permit to use or operate the same, nor shall such owner be * * * prohibited from or limited in the free use of his said motor vehicle * * * nor be required to comply with other provisions or conditions as to the use of said motor vehicle * * * except as in this act provided." (269 l, Section 12, Chapter 121, Hurd's Revised Statutes of Illinois, 1913.)

Section 13 of said act defines a chauffeur "to mean any person operating a motor vehicle as a mechanic or employe, or for hire," and provides that "no person shall operate or drive a motor vehicle as a chauffeur upon a public highway of this state * * * unless such person shall have complied in all respects with the requirements of this section."

In passing on the constitutionality of the Motor Vehicle Act of 1911, the Supreme Court of Illinois, in the case of *People v. Sargent*, 254 Ill. 514, held that the intent and effect of the act were to abrogate all municipal ordinances designed to regulate the use of motor vehicles passed prior to the time the act went into force and to deprive municipalities of the power to pass such ordinances in the future, and said that "the manifest purpose of the Legislature was to bring the whole subject of regulating the use of motor vehicles under the control of the state."

In a very recent case (April, 1915), *City of Lincoln v. Denher*, the Supreme Court has cited the foregoing and other cases with approval, and held an ordinance imposing a license on motor vehicles invalid as being prohibited by Section 12 of the statute, and that the motor vehicle law clearly indicates that the Legislature intended to take from municipalities the power of licensing and regulating motor vehicles other than motor trucks and motor driven commercial vehicles.

We are therefore of the opinion that the City Council is without power or authority to legislate in the premises.

Yours very truly,

GEORGE B. O'REILLY,

Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,

Corporation Counsel.

Drawing of Prizes from Numbers on Tickets Given to Patrons in Restaurants.

June 10, 1915.

HON. CHARLES C. HEALEY, General Superintendent of Police.

Dear Sir:

We have your communication of the 28th ult., relative to arrests made at Weeghman's, Thompson's, States and North American restaurants for conducting drawings, alleged to be lotteries, and transmitting copy of a report made to First Deputy Superintendent of Police Schuettler, and speci-

mens of tickets bearing numbers given to customers. You request an opinion of this department as to whether or not these drawings are in violation of law.

It appears that the methods employed in the restaurants mentioned is to give each patron, upon entering the place or upon payment of his check, a ticket bearing a number. At some of the places a drawing is held and the number drawn wins a prize, and at others the number winning a prize is posted on a blackboard the date following that on which the tickets are given out, prizes being awarded daily.

The statute prohibiting lotteries is as follows:

“180. SETTING UP OF.) Sec. 180. Whoever sets up or promotes any lottery for money, or by way of lottery disposes of any property of value, real or personal, or under pretense of a sale, gift or delivery of any other property, or any right, privilege or thing whatever, disposes of, or offers or attempts to dispose of any real or personal property with intent to make the disposal of such real or personal property dependent upon or connected with any chance by dice, lot, numbers, game, hazard or other gambling device, whereby such chance or device is made an additional inducement to the disposal or sale of said property, and whoever aids, either by printing or writing, or is in any way concerned in the setting up, managing or drawing of any such lottery, or in such disposal, or offer or attempt to dispose of property by any such chance or device, shall, for each offense, be fined not exceeding \$2,000.” (Hurd’s Revised Statutes of Illinois, 1913, Chapter 38, pp. 840 and 841.)

The power of the City of Chicago to suppress gaming and lotteries is derived from Clause 45, Section 1, Article V, Chapter 24, Hurd’s Revised Statutes of Illinois, 1913, and is in part as follows:

“To suppress gaming and gambling houses, lotteries, and all fraudulent devices and practices, for the purpose of gaining or obtaining money or property.”

The ordinance of the City of Chicago on the subject is in part as follows:

“No person shall sell, offer for sale, vend, barter, exchange, give away, deal in or in any way dispose of

or redeem any ticket, order, slip or device of any kind for or representing any number of shares or any interest in any lottery, policy or scheme of chance of any kind or description by whatever name, style or title the same may be denominated or known, and whether located or to be drawn, paid or carried on within or without the limits of the City of Chicago, or whether such purported drawings be real or imaginary." (Sec. 985, The Chicago Code of 1911.)

The Supreme Court of Illinois, in a case sustaining the validity of the statute, *supra*, has defined a lottery as—"a scheme for the distribution of prizes by chance." (*Dunn v. The People*, 40 Ill. 465, 467.)

In another case the Supreme Court, in commenting upon a ticket scheme, characterized the same as a lottery and said:

"Even if the ticket to the concerts and lectures, and an engraving, were intrinsically worth \$5, the scheme would still be a lottery. The handbill advertisement delivered with each ticket held out inducements to purchase. * * *

"Had not this plan been watched by the vigilance of the law, can there be any doubt that numerous persons would have purchased tickets, prompted by the hope of gain? Are there not inseparably connected with it the same fascination and excitement and intense desire for gain, which gather around the gaming table?

"Like any other species of gambling, lotteries have a pernicious influence upon the character of all engaged in them."

Thomas v. The People, 59 Ill. 160-164.

In a recent case in the Federal Courts, where selling cuts of tobacco for five cents each in one of which was a prize number which entitled the purchaser to fifty cents in cash redeemable by the manufacturer was held to be a lottery, the court said:

"Suppose instead of placing a redeemable tag in the cut of tobacco, the claimant had placed therein a silver half dollar. The absolutely decisive contingency would lie in the choice of cuts, and the prize would be his who selected the cut containing the coin. Could it be said that the possession of the coin was not dependent upon the event of a lottery? Under this very clever scheme the lottery is conducted in the shop of the re-

tailer. The tickets are the five cent cuts of tobacco, each of which, under the testimony in the case, is worth at retail the price charged for it, and one of which out of every 100 is worth 50 cents in addition. The possession of this prize is determined by chance, and the case seems in principle not different from of *Reg. v. Harris*, 10 Cox's C. C. 352. Still more nearly in point is the case of *Taylor v. Smetter*, 11 Q. B. D. 207, where packets, each containing a pound of tea, were sold at so much per packet. In each packet was a coupon entitling the purchaser to a prize, said prizes varying in value and in character. The tea was admittedly worth the money paid for it. In this case the purchaser of each packet was entitled to a prize, the nature and value of which was determined by the coupon hidden in the packet. It was held that this was a lottery. It would assuredly not have been less so had only one packet of tea in every 100 contained a coupon calling for a definite value."

United States v. One Box of Tobacco, 190 Fed. Rep. 731, at page 733.

See also *Price v. Burns*, 101 Ill. App. 418.

Horner v. United States, 147 U. S. Rep. 449, (one of the leading cases in the country on the subject of lotteries).

Humes v. City of Fort Smith, 93 Fed. Rep. 857.

In the cases here considered numbers, in addition to the commodities purchased, are given to the customers. A number may draw a prize, dependent upon the event of a drawing, a lottery, or a number arbitrarily selected and posted on a blackboard, a chance.

We are of the opinion that these methods of distributing prizes are included in a "lottery scheme," as the term has been repeatedly defined by the courts, and is therefore in violation of both the ordinance of the City of Chicago and the statute of the State of Illinois.

We herewith return copy of report and tickets accompanying your letter.

Very truly yours,

GEORGE B. O'REILLY,
Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,
Corporation Counsel.

Status of Police Officers Reinstated by Order of Court.

June 11, 1915.

HON. CHARLES C. HEALEY, General Superintendent of Police.

Dear Sir:

Your letter of May 24th requesting an opinion as to whether—

First. The former members of the Police Department who have been reinstated in the service under orders of court, and in whose cases motions to vacate the orders of reinstatement have been made and are now pending, may be retained in the service pending a decision on these motions; and,

Second. The former members of the Police Department who have been reinstated in the service under court orders, and in whose cases appeals are pending but no motions to vacate the orders of reinstatement have been made, may be retained in the service during the time pending the appeals.

We advise you that appeals have been prayed and allowed in all these cases, which appeals stay the issuance of the writs until the appeals are disposed of, so that you cannot be compelled to retain these persons in the service during the appeal time.

However, we advise you that in our opinion you may, if you so desire, retain those former members of the department under the first classification in the service pending the decisions on these motions to vacate, and thereby avoid any possibility of suits against the city for salary for the period of time pending the decisions on these motions. If the motions are allowed, you may then drop these persons from the service. If the motions are denied, you may retain these persons in the service pending the appeals in the Appellate Court and thereby avoid any possibility of suits against the city for salary for the time pending the appeal in case the Appellate Court should affirm the decisions of the lower court.

We further advise you that in our opinion you may, if you so desire, retain the former members of the department under the second classification in the service pending the ap-

peals in the Appellate Court and thereby avoid any possibility of suits against the city for salary for the time pending the appeals in case the decisions of the lower court are affirmed.

Yours very truly,

JOHN E. FOSTER,
Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,
Corporation Counsel.

Status of Representative of Health Department on Board of Trustees of Municipal Tuberculosis Sanitarium.

June 11, 1915.

HON. JOHN DILL ROBERTSON, M. D., Commissioner of Health,
Chicago.

Dear Sir:

We are in receipt of your letter of recent date in which you make inquiry concerning the status of the representative of the Health Department on the Board of Trustees of the Municipal Tuberculosis Sanitarium.

You first ask whether the commissioner of health is a member of such board *ex-officio* or whether he may be appointed by the mayor and confirmed by the City Council. In reply to this question we beg to refer you to Sections 3, 4 and 5 of the act creating public tuberculosis sanitariums which unquestionably requires the appointment of all three of the directors by the mayor with the approval of the City Council.

Section 3, reads as follows:

“When any such city council or board of trustees shall have decided to establish and maintain a public tuberculosis sanitarium under this act, the mayor of such cities and the president of the board of trustees of such villages shall, with the approval of the city council or board of trustees, as the case may be, proceed to appoint a board of three directors, one of whom, in cities or

villages having a board of health, shall be from such board of health, and the other two from the citizens at large and shall be chosen with reference to their special fitness for such office.”

You will observe from the above that, strictly speaking, it is not incumbent upon the mayor to select the commissioner of health as one of the directors, because in this city we have no local board of health; and the statute requires that only in such cities where there is a board of health shall one of the three directors be selected from such board of health.

It has been the custom, however, to look upon the commissioner of health as standing in the place of a board of health, and therefore the Health Department has always been represented by the commissioner of health on the board of directors of the sanitarium. This has been by virtue of the selection of the mayor and not by operation of law, and therefore the commissioner of health cannot be regarded as an *ex-officio* member of the board.

Your second question is whether it would be necessary in the present instance to have Dr. Young's resignation from the board if his successor is to be appointed, since his term was not completed when he retired from the office of commissioner of health. We believe that it would be necessary to secure such resignation before his successor could be lawfully appointed.

The sections of the statute to which we referred above seem to contemplate that the tenure of the appointments should be on the basis of the terms for which they are made, and that no change of administration or change in the status of the representative from the board of health, if there is one, should alter his position as a member of the board of directors.

Section 4 of the act above referred to states that the directors shall hold office for three years, one of them retiring each year and the new appointment should be made before the first day of July each year. It does not take into account that one member who was on the board of health might have retired from the board of health while still a member of the board of directors, and it might be understood as requiring

the appointment of another member of the board of health to a vacant position regardless of the fact that a former member of such board still holds one of the places. Such a contingency, however, cannot arise in this city since it is not incumbent on the mayor to appoint any particular person or member of any particular body.

It has been the custom to appoint the commissioner of health presumably because it was desirable to have the Health Department represented on the board of directors. If the present commissioner of health is to be appointed in Dr. Young's place, therefore, the latter's resignation should be obtained.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,
Corporation Counsel.

Licenses Issued to Persons Not Citizens of the United States

June 14, 1915.

MISS MARY SYNON, Secretary, Morals Commission.

Dear Madam:

In compliance with your request, we have prepared ordinances designed to control the issuance of licenses to keepers of billiard and pool tables and bowling and pin and ball alleys and dance halls.

We deem it expedient to amend two separate sections of The Chicago Code of 1911 for this purpose rather than to pass an independent ordinance which would conflict with the provisions contained in the code. We also deem it advisable to make the ordinances separate, since they amend different parts of the code.

We would regard an ordinance which prohibits the issuance of such licenses to any one who is not a citizen of the United States as contrary to law.

The Fourteenth Amendment to the Constitution of the United States prohibits any state from depriving any person of life, liberty or property without due process of law, and from denying to any person within its jurisdiction the equal protection of the laws.

There have been numerous decisions of the courts which deal with the meaning of these provisions of the Federal Constitution. Some of these relate to municipal ordinances. The leading case on this branch of the subject is the case of *Yick Wo v. Hopkins*, 118 U. S. 356. In that case it was held that a municipal ordinance violates the provisions of the Constitution of the United States if it makes arbitrary and unjust discriminations founded on distinctions of race between persons otherwise in similar circumstances.

We regard the case as conclusive on this point. We have therefore left out from the ordinances the proposed discrimination which would permit licenses of this kind to be issued only to American citizens. We forward the two ordinances herewith.

Very truly yours,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

BRYAN Y. CRAIG,
First Assistant Corporation Counsel.

Increase of Deposit in One of the City's Depositaries.

June 14, 1915.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

In your letter of this date, you have referred to us the request of the Greenebaum Sons Bank & Trust Company, for an additional deposit of \$100,000, so that the total maximum amount their bank would be entitled to receive would be \$350,000 instead of \$250,000, for which they asked at the time they submitted their bid.

We see nothing contrary to law in any such proposed increase. The whole matter seems to be governed by Section 28 of The Chicago Code of 1911, which reads as follows:

“28. INCREASE OF DEPOSIT—BOND.) Whenever any bank named as a depositary of the city funds shall desire to have the deposit of such funds increased, the city comptroller is hereby authorized to increase the amount of such deposit to a sum not exceeding one-half the capital stock, surplus and undivided profits of such bank; provided, however, before any increase of such deposit is made, such bank shall present to the City Council a bond securing such deposit and such bond shall be approved by the City Council.”

The primary object of obtaining bids in the month of December, according to the statute and ordinances, is to secure the highest rate of interest obtainable for city funds. Neither the statute nor the ordinances require the banks to state what amount of such funds they desire to have placed with them. The only reason why it is done is for the purpose of arriving at some understanding as to the amount of the bond of the bank and the distribution of the deposits of the city.

In the report of the comptroller to the City Council, under date of December 14, 1914, no mention was made of the various amounts which the banks had indicated they wanted. In the ordinance passed on December 28, 1914, the banks are simply designated as depositaries. Consequently, nothing appears in the records of the City Council to indicate an intention of keeping the deposit in this institution within any prescribed limit. The only thing that need be considered in this connection, is whether the bank has bound itself to accept a certain limited amount. We do not think this inference can be drawn from the fact that they asked for a certain amount when they submitted their bid, because it must be assumed that they had knowledge of the ordinance quoted above, which permits an increase.

We are, therefore, of the opinion that in case this bank submits its bid and it is approved by the City Council, the deposit in that institution may be increased, provided it does

not exceed the limit imposed by the ordinances, which is one-half of the combined capital stock and surplus of the institution.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

BRYAN Y. CRAIG,
First Assistant Corporation Counsel.

Authority of Board of Directors of the Municipal Tuberculosis Sanitarium to Build Extension.

June 14, 1915.

MR. FRANK E. WING, Secretary, Municipal Tuberculosis Sanitarium.

Dear Sir:

Your letter of the 4th inst., requesting an opinion as to whether the Municipal Tuberculosis Sanitarium Board has the power to order and pay for the extension referred to in your letters thereunto attached out of the sanitarium fund, and whether the matter should first be submitted to the City Council for approval, has been received.

It appears from the letters attached to your communication that the extension referred to in your letter is an extension of the 12-inch main in Bryn Mawr avenue from Kedzie avenue to Central Park avenue and north in Central Park avenue about 1,250 feet to a point opposite your power house connecting with your present supply, in order to give sufficient pressure for fire protection and other purposes to the sanitarium. This would call for an extension of about 3,900 feet of 12-inch main at an estimated cost of Seven Thousand Eight Hundred Dollars (\$7,800); that the Water Pipe Extension Department has informed you that there will be absolutely no revenue on this pipe and, on this account, they ask that the money to cover this expense be advanced by your Board of Directors, the same to be refunded

as soon as the permanent annual revenue on this pipe amounts to six cents per lineal foot.

Your sanitarium was established under "An Act to enable cities and villages to establish and maintain public tuberculosis sanitariums," approved March 7, 1908, in force July 1, 1908.

Section 6 of said act enumerates the powers and duties of directors, and is in part as follows:

"They shall have the exclusive control of the expenditures of all moneys collected to the credit of the tuberculosis sanitarium fund and of the construction of any sanitarium building * * * and of the supervision, care and custody of the grounds, rooms or buildings constructed, leased or set apart for that purpose:"

It is our opinion, in view of the above section, that the sanitarium board has the power to pay for the extension referred to in your letter without first submitting the matter to the City Council for approval. I am informed, however, that it has been the custom of your board to submit matters of this kind to the City Council for approval, and it will do no harm to do so in this case if you so desire.

Yours very truly,

LEON EDELMAN,

Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,

Corporation Counsel.

Disposition of Furniture Left on Sidewalk and Street.

June 18, 1915.

HON. WALTER G. LEININGER, Superintendent of Streets.

Dear Sir:

In reply to yours of the 11th inst., in which you ask what disposition to make of furniture from twenty-nine rooms of a building at 29th street and Groveland avenue which is scattered about the walk and roadway, and whether you can haul

it away to a garbage dump and burn it, we beg to reply as follows:

Sections 2434 and 2435 of The Chicago Code of 1911 are as follows:

“2434. OBSTRUCTIONS—REMOVAL.) The commissioner of public works is hereby authorized to order any article or thing whatsoever which may incumber or obstruct any street, alley, public landing, wharf or pier within said city to be removed; if such article or thing shall not be removed within six hours after notice to the owner or person in charge thereof to remove the same, or if the owner cannot be readily found for the purpose of such notice, he shall cause the same to be removed to some suitable place, to be designated by the said commissioner. The owner of any article so removed shall be subject to a penalty of not more than ten dollars, in addition to the costs of such removal.

“2435. OBSTRUCTIONS—SALE AUTHORIZED.) Any article or thing, which may be removed in accordance with the preceding section, if of sufficient value to more than pay the expenses thereof, shall be advertised ten days and sold by the Department of Public Works, unless the same shall be sooner reclaimed, and the penalty and cost paid by the owners thereof. The proceeds of such sale shall be paid into the city treasury and the balance, if any, after deducting the penalty and costs, shall be paid to any person or persons furnishing satisfactory proof of ownership.”

The above sections set forth the rights and the procedure to be taken by the commissioner of public works in matters of this kind.

We are informed however, that in this matter you have been unable to find the owner of the furniture to give him the notice required under Section 2434, above set forth, and that the furniture is in such shape that it is not worth while to remove it, that the commissioner of public works has no suitable place to store it, and that it is obstructing travel along the walk and roadway of said street.

In the case of *McLean et al. v. Mathews*, 7 Ill. App. 599, the court held:

“Whatever obstructs travel on a public highway or navigable stream, is a common nuisance, and may be

abated by any of the king's subjects. So, where plaintiffs had fastened an old, disused, and nearly sunken boat to a pier in such a way as to impede the navigation of the Chicago river, the defendants, acting under the authority of the Board of Public Works, had the right to remove it as a public nuisance, if indeed they did not have the right to do so without any orders."

Again, at page 602, the court stated and quoted as follows:

"It is a settled principle of the common law, that whatever obstructs travel in public highways and navigable streams is a common or public nuisance, which may be removed and abated by any of the king's subjects. 4 Black. Com. 167; *Earp v. Lee*, 71 Ill. 193. In Comyn's Dig. Tit. Action on the Case for a Nuisance, D. 4, it is said: 'If it be a common nuisance, as a gate erected across a highway, every one may throw it down.' In Bacon's Ab. Tit. Nuisance, 6: 'Any one may pull down or otherwise abate a common nuisance, as a new gate, or even a new house, erected in a highway; for if one whose estate is prejudiced by a private nuisance may justify the entering into another's grounds and pulling down and destroying it, it cannot but follow, *a fortiori*, that any one may destroy a common nuisance.'"

From the above state of facts and the decisions above set out, it is our opinion that if the furniture is of sufficient value to pay the expense of storage and advertising, the commissioner of public works should remove the same to some suitable place and sell it, in compliance with Sections 2434 and 2435 above set forth. However, if it is not of sufficient value to pay the expense of removal and advertising, then you may regard it as a common nuisance and dispose of it as such; but before so doing, you should itemize the same carefully, giving a detailed description of each piece of furniture, and preserve said list for identification in the event of future litigation.

Respectfully submitted,

LEON EDELMAN,

Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,

Corporation Counsel.

Status of Dealer in Second-Hand Clothes Going from House to House to Purchase.

June 21, 1915.

HON. CHAS. J. FORSBERG, City Collector.

Dear Sir:

In reply to yours of May 15, in which you request information as to whether a person who goes from house to house and buys new and second-hand clothing, shoes, etc., takes same back to his home and then sells said wares in bulk to a second-hand dealer, is defined to be a peddler or second-hand dealer under the city ordinance, we beg to state as follows:

Section 1760 of The Chicago Code of 1911 defines a peddler as follows:

“DEFINITION OF PEDDLERS—PEDDLERS REQUIRED TO BE LICENSED—PENALTY.) Every person who shall sell or offer for sale, barter or exchange, at retail, any goods, wares, merchandise, fruits, vegetables or country produce, traveling from place to place on, along or upon the streets of the city, or who shall sell and deliver from any wagon, pushcart or other vehicle going from place to place, any goods, wares, merchandise, fruits, vegetables or country produce, or who shall go about from place to place selling and delivering goods, wares, merchandise, fruits, vegetables or country produce, shall be deemed a peddler and shall before engaging in such business obtain a license as a peddler as hereinafter provided.

“No person shall engage in or conduct the business of a peddler as above specified and defined without a license, under a penalty of not less than twenty dollars nor more than fifty dollars for each offense.”

It is apparent from the above section that he does not come within the definition of a peddler, as he buys from house to house and does not sell or offer for sale, barter or exchange any goods, wares, merchandise, etc.

The only remaining question is: Does he come within the ordinance relating to second-hand dealers?

Section 2240 of The Chicago Code of 1911, provides in Chapter LXIV:

“The mayor may grant licenses to such persons as shall produce to him satisfactory evidence of good character, to carry on the business or conduct a second-hand store in the city.”

Section 2241 provides that “licenses to second-hand *dealers* shall be issued for semi-annual periods,” etc. and Section 2243 provides:

“No person shall carry on or conduct a second-hand store without being especially licensed for such purpose, and any license issued under the provisions of this article shall designate the place in which the person so licensed shall carry on such business; provided, however, that such business shall not be carried on or conducted in any other place than that designated in or by such license.

“No person licensed under the provisions of this article shall be permitted to solicit business for such second-hand store upon any street or public highway of the city. Any person violating any of the provisions of this section shall be fined not less than fifty dollars nor more than two hundred dollars for each offense.”

To construe the foregoing sections of the ordinance in a manner so as to make them perfectly reconcilable, we think that Section 2243 may be interpreted to mean that “no person shall carry on the business of a second-hand dealer, or conduct a second-hand store, without being especially licensed for such purpose,” etc.

Therefore, in our opinion, he comes within the provisions of this ordinance as a second-hand dealer, and must obtain a license as such.

Respectfully submitted,

LEON EDELMAN,
Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,
Corporation Counsel.

**Order Directing Contractors to Refrain from Importing
Persons from Other Cities for Work on City Contracts.**

June 21, 1915.

HON. W. R. MOORHOUSE, Commissioner of Public Works.

Dear Sir:

We have your letter of the 18th ultimo, in which you ask the corporation counsel to advise you "whether or not the City of Chicago, through either the mayor or the commissioner of public works, has the right to carry out the provisions of" an order passed by the City Council at its meeting on Monday, May 17, 1915, whereby it was ordered "that the City of Chicago, by his Honor, the Mayor, notify the contractors engaged upon all public improvements that any effort upon their part to import persons from other cities to engage in the above mentioned work or any part thereof would be violative of the principle, intent and purposes of the specifications and contracts and inimical to the public welfare of the City of Chicago, its trades, business and industry, and that the importation of such men would tend against the erection and construction of such public works and improvements as above mentioned in a safe, suitable and proper manner."

We shall assume that you desire to be advised as to:

(1) Whether the language of the contract puts you under any legal obligation to follow the instructions of the order; and

(2) Whether you ought to obey the order—so far as this is a lawyer's question.

By the order you are directed to notify the contractors that any effort to import persons from other cities to do the work on the contracts would be violative of the principle and intent and purposes of the contracts. As a matter of fact, this is not so. The "principle and intent and purposes" of a contract are to be gathered from the language of the contract itself. There is not a word in these contracts which prohibits the importation of laborers from other cities. There

is nothing which, even in the least degree, implies that such importation is intended to be prohibited.

This office has several times been asked by the City Council to advise whether under the decisions of the Supreme Court of Illinois, stipulations limiting the rights of contractors as regards the kinds or classes of labor they might employ could properly be put in contracts for public work. The answer has always necessarily been in the negative.

We advise you that for the reasons herein given, there exists no legal basis for this order, and that you could not be compelled by any legal process to obey it.

The question whether, apart from legal obligation, you ought to obey this order is hardly a lawyer's question. If you desire to go as far as you reasonably may in the direction of meeting the wishes of the Council, you might carry such desire into effect by sending to each contractor the letter, a draft of which is herewith attached. This would constitute a compliance with the spirit, if not with the letter, of the Council's order, and would not make the mayor or you responsible for any statement which is contrary to the fact.

To the foregoing suggestion it may be objected that the service of such a notice on the contractors might possibly have the effect of, in some way, modifying the provisions of the contract as to the time within which the work must be finished. It may be as well, therefore, to briefly discuss this question.

The printed form of a contract for work commonly used by the city provides that the work must be finished and fully completed by a date to be filled in in each case. There is no provision in this printed form obligating the contractor to pay a stipulated sum as liquidated damages for each day of delay. We are told by Mr. Murphy, in the office of the commissioner of public works, that, while this provision for liquidated damages in case of delay is sometimes inserted in contracts, where there is some special reason for hurrying the contractor, these cases are very rare, and do not exceed about two per cent of the city's contracts for work. The printed form further provides that—

“If the time of performance of the contract be for any reason either expressly or by implication extended, such extension shall not affect the validity of the contract or the liability of the sureties on the bond.”

We have not been able to find that the specific question under discussion has ever been passed upon by the courts. We are inclined to think, however, that the principle of equitable estoppel, as established by numerous decisions in this jurisdiction and elsewhere, is broad enough to justify the following conclusions in regard to the particular matter now under consideration :

1. If, in the exceptional case of a contract containing the provision for liquidated damages in case of delay, the contractor were in a position to prove that the delay had been in fact caused by his obeying the expressed wish of the Council as to the non-employment of a certain class of laborers, although he might not be legally compellable to obey such wish, the city would be estopped from enforcing the penalty for a delay which was the result of the contractor's complying with its wish, as expressly conveyed to him.

2. We understand from Mr. Murphy that it is not the practice to strictly enforce the time limit in the case of those contracts—the great majority—which have no provision for liquidated damages. As a rule, if the delay be not entirely unreasonable, and the damages occasioned thereby be not considerable, the work is accepted without any claim for damage on account of delay. If, however, in any particular case, there were considerable damages caused by the city by the delay, and if the contractor were in such case in a position to prove that the delay had been in fact caused by his obeying the expressed wish of the Council as to the non-employment of a certain class of laborers, although he might not be legally compellable to obey such wish, the city would be estopped from recovering damages for the delay which was the result of the contractor's complying with its expressed wish.

The question may also arise whether the mere passage of the order by the City Council might not possibly have

the effect above indicated, without any special communication of such order to the contractors by the mayor or by the commissioner of public works.

As regards this, it is to be noted that the order does not purport to be itself a notice to the contractors. It directs the mayor to give such notice; and, until such notice is given by the mayor or by the commissioner of public works acting for the mayor, the contractors have no official knowledge of the passage of the order, although they may, and no doubt do, have actual knowledge of such passage.

We do not think that the contractors could rely on the mere passage of the order as creating an estoppel, in case they were to comply with the request therein contained, without having received formal notice from the mayor or the commissioner, and were afterwards able to show that a delay in the completion of the work was the necessary result of their complying with such order.

Yours respectfully,

WILLIAM DILLON,
Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,
Corporation Counsel.

Status of Employees in Law Department with Respect to Civil Service.

June 23, 1915.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

In reply to your inquiry of June 2, as to whether or not employees in the Law Department not engaged in the practice of law should come under the Civil Service Law, we have the honor to report to you that by virtue of Section 3 of the act entitled "An Act to regulate the civil service of cities," approved March 20, 1895, the Civil Service Commission is required to classify all of the offices and places of

employment in the city, except those offices and places of employment mentioned in Section 11 of said act.

Section 11 referred to, is as follows:

“Sec. 11. Officers who are elected by the people, or who are elected by the City Council pursuant to the city charter, or whose appointment is subject to confirmation by the City Council, judges and clerks of election, members of any board of education, the superintendent and teachers of schools, heads of any principal department of the city, *members of the law department*, and one private secretary of the mayor, *shall not be included in such classified service.*”

Section 85 of The Chicago Code of 1911 provides for the Department of Law in the following language:

“There is hereby established an executive department of the municipal government of the city which shall be known as the Department of Law and which shall embrace the corporation counsel and such number of assistants and *clerks* as the City Council may by ordinance provide.”

In our opinion, all clerks or employes on the payroll of the Law Department and subject to the direction and supervision of the corporation counsel of the city are members of the Law Department within the meaning of Section 11 of the Civil Service Law hereinabove quoted and are expressly *exempted* from the classified service of the city, which is subject to the Civil Service Law.

Respectfully submitted,

J. F. GROSSMAN,

Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,

Corporation Counsel.

Civil Service Employees Having Custody of Money.

June 24, 1915.

HON. PERCY B. COFFIN, President, Civil Service Commission.

Dear Sir:

We have your communication of June 10, 1915, stating

that the Civil Service Commission is in receipt of reports signed by Charles J. Forsberg, City Collector, suspending John F. O'Brien, cashier in his office, and Jeremiah F. McCarthy, deputy city collector, pending the filing of charges.

The point, which you desire to be advised upon, is whether the Civil Service Commission has jurisdiction in the matter of the hearing of charges which may be preferred against these men, in view of the fact that both of the persons suspended, in the course of their duties, have the custody of public money, for the safekeeping of which the city collector has given bond.

Section 12 of an act entitled "An Act to regulate the civil service of cities," provides that the officer or employee in the classified civil service of the city, who has been appointed under the rules of the Civil Service Commission after examination, shall not be removed or discharged except for cause upon written charges and after an opportunity to be heard in his defense.

It is also provided in said section as follows:

"Nothing in this section shall be construed to require such charges or investigation in cases of laborers or persons having the custody of public money, for the safe-keeping of which another person has given bonds."

The following is a statement of the duties of the position of cashier in the city collector's office, held by John F. O'Brien until his suspension, as shown by the records of the Civil Service Commission:

"Receives all moneys payable in the office of the city collector and gives receipts therefor; exercises a watchful supervision over his assistants; receives from them at the close of each business day all moneys collected by them, together with a written statement from them covering money collected and sources thereof, and checks and audits such statements; at the close of each business day prepares an itemized statement of all moneys received; sees that the receipts balance with itemized statements, and deposits with the city treasurer all moneys received."

There can be no doubt from the foregoing that Mr. O'Brien, while occupying the position of cashier in the city

collector's office, was a person having the custody of public money.

The following is a statement of the duties of the position of deputy city collector, held by Jeremiah F. McCarthy until his suspension, as shown by the records of the Civil Service Commission:

"Duties are of an executive nature involving responsibility of the highest order; assigns clerks and sees that they perform their duties in a proper manner; keeps daily efficiency record of all employes of the office; prepares for the city collector an annual estimate of the money required to operate the office and sees that the appropriations are not overdrawn.

"In addition to executive duties, has charge of assignment of the right of renewal of saloon licenses, under the Harkins Act of July 31, 1906, which assignments are made a matter of record.

"Has charge of office in absence of the city collector."

It will be seen from the foregoing that, while the duties performed by Mr. McCarthy prior to his suspension did not specifically charge him with the handling of public money, he must necessarily have had the custody of public money during the course of his employment while in charge of the office of city collector in the absence of the latter, for it is provided in Section 80 of The Chicago Code of 1911 as follows:

"80. PAYMENTS OF MONEY.) License fees, fees for inspections, fees for permits, compensation for franchises and all other payments of money, not otherwise specifically provided for, to the city, shall be paid direct to the city collector, and such payments shall be by the city collector transmitted daily to the city treasurer; provided, that where the public convenience requires it, the Department of Finance may authorize the payment of license fees and fees for permits to be made to the officer authorized to issue such license or permit; and, provided, further, that collections by the water bureau shall be paid direct to the city treasurer; and, provided, further, collections of fines by the Municipal Court shall be transmitted according to law to the city collector."

Now, the city collector is by ordinance specifically held

responsible for the fidelity of all his subordinates including, of course, the deputy city collector and the cashier.

Section 78 of The Chicago Code of 1911 provides as follows:

“78. ~~CLERKS—APPOINTMENT OF—REMOVAL.~~) Said collector shall appoint according to law such assistants, clerks and subordinates in his office as the City Council may authorize, and he may remove any such appointees according to law. He shall be held responsible for the fidelity of any person appointed by him who shall have the custody of public money and he may remove any such person in his discretion for any reason he may deem proper.”

It is also provided in Section 77 of The Chicago Code of 1911 that the city collector shall, before entering upon the duties of his office, execute a bond, with sureties to be approved by the City Council, in the sum of two hundred and fifty thousand dollars, conditioned for the faithful performance of the duties of his office. Such a bond has been executed by the present city collector, Charles J. Forsberg, and has been approved by the City Council and is now on file in the office of the city clerk.

From all of the foregoing facts and circumstances, we are of the opinion that John F. O'Brien and Jeremiah F. McCarthy, during the incumbency of their offices, were persons having the custody of public money, for the safe keeping of which another person (Charles J. Forsberg) has given bonds, within the meaning of Section 12 of the Civil Service Act, and charges or investigation in these cases are not required by law.

However, there is nothing in the civil service law which prevents the city collector from filing such charges before the Civil Service Commission, if he so desires, and, under the law, we are of the opinion that the Civil Service Commission has jurisdiction to investigate such charges and make its finding as in all other civil service cases. In other words, the provision of Section 12 of the Civil Service Act exempting the head of the department from the *necessity* of filing charges in cases of persons having custody of public money, for the safe

keeping of which the head of the department has given bond, does not preclude him from filing such charges and requiring the usual procedure to be followed by the Civil Service Commission. It is a matter which lies solely in the discretion of the city collector.

Respectfully submitted,

JOSEPH F. GROSSMAN,
Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,
Corporation Counsel.

**Liability of City for Damages to Property on account of
Change of Grade.**

June 24, 1915.

HON. W. R. MOORHOUSE, Commissioner of Public Works.

Dear Sir:

We have your request of June 18th for an opinion concerning the liability of the city for damages arising out of the change of grade of the east approach to the river at Monroe street.

The question which you ask us to consider is one that is not entirely free from doubt. Any argument which may be made on either side of the question under consideration must undoubtedly be predicated upon the construction which should be placed upon Section 13 of Article II of the Constitution of 1870, which provides:

“Private property shall not be taken or damaged for public use without just compensation. Such compensation, when not made by the state, shall be ascertained by a jury, as shall be prescribed by law. The fee of land taken for railroad tracks, without consent of the owners thereof, shall remain in such owners, subject to the use for which it is taken.”

That none of the property abutting on Monroe street will be taken by the change in grade of that street is a proposition that seems to be beyond dispute. The remaining ques-

tion then becomes: "Is there any property of the abutting owners on Monroe street damaged by reason of the change in grade?"

The subject which we are about to consider is discussed in *Rigney v. City*, 102 Ill. 64, wherein the court, at page 75, says:

"Under this condition of affairs the framers of the present constitution, doubtless with a view of giving greater security to private rights by affording relief in such cases of hardship where it had before been denied, declared therein that 'private property shall not be taken *or damaged* for public use without just compensation.' The addition of the words 'or damaged' can hardly be regarded as accidental, or as having been used without any definite purpose. On the contrary, we regard them as significant, and expressive of a deliberate purpose to change the organic law of the State. Nor were they used simply to conserve existing rights, as has been suggested by counsel, but on the contrary, in our judgment, they declare a new rule of civil conduct, from which spring new rights which did not exist under the constitution of 1848. As we have already seen, the provision in that constitution extended to all cases where the injury to property was direct and physical, as well as where there was an actual appropriation or taking. The rights of the people, therefore, under the old constitution, were conserved just as much in one of these two classes of cases as in the other, and were fully protected in both, and to say that the words 'or damaged' were added in the new constitution for the purpose of conserving rights pertaining to either class, is equivalent to saying these words were added to effectuate a purpose that was fully accomplished under the old constitution without them—or, in other words, is equivalent to saying that their insertion in the new constitution was simply superfluous. There seems to be no escaping this conclusion, for the provisions in both constitutions are in effect the same, with the exception of the additional words in question.

"The position of appellee that the new constitution was simply intended to conserve existing rights, and that therefore there can be no recovery in any case except where there has been an actual appropriation of, or physical injury to, the plaintiff's property, is founded in part upon certain expressions to be found in some of the cases which have arisen since the adoption of the new

constitution, which seem to recognize as still existing the old test that the injury must be direct and *physical*, where there has been no actual appropriation or taking of the property. It is hardly necessary to observe that what is said in any case upon a matter not necessarily involved in the decision, is not to be regarded as authoritative or binding. Such expressions can only be regarded as indicating the views of the members of the court, and particularly that of the writer of the opinion, upon a matter which the court is not required to, and consequently can not judicially determine, and hence, while they are entitled to respectful consideration, they are never accepted as authoritative. An examination of the cases, it is believed, will clearly show that no express decision to that effect has ever been made, and even if such a case could be found, it must have been made without due consideration, and should not be followed, for to recognize such a rule would, in effect, as we have already shown, be to render inoperative a plain provision of the constitution.”

And continuing, at page 80, the court says:

“There are certain injuries which are necessarily incident to the ownership of property in towns or cities which directly impair the value of private property, for which the law does not, and never has, afforded any relief. For instance, the building of a jail, police station, or the like, will generally cause a direct depreciation in the value of neighboring property, yet that is clearly a case of *damnum absque injuria*. So as to an obstruction in a public street—if it does not practically affect the use or enjoyment of neighboring property, and thereby impair its value, no action will lie. In all cases, to warrant a recovery it must appear there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives to it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally.”

An examination of the opinion in the case from which we have just quoted will show that the facts there involved are sufficiently analogous to those involved in this case to make the Rigney case worthy of the most profound consideration in

determining the question on which you ask our opinion. It will also be noted that the opinion was not unanimous, and that at least one of the justices dissented. So that, the opinion cannot be said to be *stare decisis*.

In *C. & N. W. Ry. Co. v. City*, 140 Ill. 309, the City of Chicago sought to condemn an easement across the right of way of the railroad company. At page 315 the court says:

“The question is, whether, in a case where a city institutes a condemnation proceeding to open or extend a street across a railroad already constructed, the company owning such railroad is entitled to be allowed, as a part of its just compensation, the amount of its expenses in constructing and maintaining the street crossing.”

And continuing, at page 317, the court says:

“Government owes to its citizens the duty of providing and preserving safe and convenient highways. From this duty results the right of public control over public highways.”

It will thus be seen that the court clearly indicates that, in laying out and extending highways, the city is acting in its governmental, as distinguished from its private capacity, and in this connection it has been held in this state that a bridge is a part of the street.

City v. McGinn, 51 Ill. 266.

Village v. Howland, 124 Ill. 547.

The court, continuing its opinion in the Chicago & North-Western case, at page 318, says:

“The items of expense, for which appellant claims compensation, are such only as are involved in its compliance with a police regulation of the statute. It is well settled that ‘neither a natural person nor a corporation can claim damages on account of being compelled to render obedience to a police regulation designed to secure the common welfare.’ (*C. & A. R. R. Co. v. J. L. & A. R. R. Co.*, 105 Ill. 388.)”

And continuing its opinion further, the court, at page 323, says:

“These items of expense are set up in the cross-petition as damages to the property not taken; that is, to

the right of way on either side of that portion of the right of way which is to be used as a street. How can grading the approaches, planking the crossing and erecting gates damage the right of way adjoining the street crossing? The expenses which they necessitate may require a deduction from the revenues of the company, but there is no proof to show that there is any such injury or inconvenience as reduces the capacity of the corporation to transact its business. Not the grading, or planking or gates, but the use of the crossing by the public may result in the stoppage, or slower movement of trains, and in the increased danger of accidents, but we have held that no damages can be allowed for these inconveniences. (*P. & P. U. Ry. Co. v. P. & F. Ry. Co.*, *supra*; *C. & A. R. R. Co. v. J. L. & A. Ry. Co.*, *supra*.)

Uncompensated obedience to a regulation enacted for the public safety under the police power of the state is not a taking or damaging without just compensation of private property, or of private property affected with a public interest. (*R. R. Co. v. Co. Commissioners*, 79 Me. 386.)”

The next in order of importance which challenges our attention is *City v. Jackson*, 196 Ill. 496. This case involves the change in the grade of a street occasioned by the construction of a subway in the street in order to facilitate track elevation.

At page 501 of its opinion the court says:

“The theory of the plaintiff’s case is, that the city having thus changed the grade of the street, or caused the same to be done, so as to damage his property, he is entitled to recover under that provision of the constitution which provides, ‘private property shall not be taken or damaged for public use without just compensation.’ The city insists there can be no recovery, for the reason that ‘private property has not been taken for public use,’ but that whatever injury has been done to plaintiff’s property is the result of the legitimate exercise of the police power of the state and the damages *damnum absque injuria*. Therefore, it is insisted, it was error in the trial court to refuse the peremptory instruction to find for defendant and to give instruction No. 1 on behalf of the plaintiff.

“The question in this form is a new one in this state, and so far as we have been able to ascertain, has never

been directly decided by any court. It is a question of the first importance both to the city and property holders upon streets over which the railroads in the city must be elevated, in the interest of the public safety to life and property."

And continuing, at page 502, the court says:

"Laws and ordinances relating to the comfort, health, convenience, good order and general welfare of the inhabitants are comprehensively styled 'police laws or regulations'; and it is well settled that laws and regulations of this character, though they may destroy the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbance. They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner. If he suffers injury, it is either *damnum absque injuria*, or, in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure."

And again, at page 505 of its opinion, the court says:

"It has been uniformly held by this court that any change in the grade of a street by which egress and ingress is obstructed to the private property of an owner is damaging private property for public use within the meaning of Section 13 of Article 2 of the Constitution of 1870. (*Rigney v. City of Chicago*, 102 Ill. 64; *Chicago and Western Indiana Railroad Co. v. Ayres*, 106 *id.* 511; *City of Bloomington v. Pollock*, 141 *id.* 346; *City of Joliet v. Blower*, 155 *id.* 414.) The rule thus uniformly announced has never been qualified or limited by the object or purpose which the municipality had in view in ordering the change. It is true that the term 'police power' is not mentioned in the opinion of the court in these cases, nor, so far as we know, was it referred to in the briefs and arguments of counsel; but the question argued and decided in each of them was the liability of the city, under the foregoing clause of the constitution, in making the change in the grade of the street, and it was in every case held that it was liable."

It will be observed that the tracks of the railroad in question would have been elevated, and the public safety thereby conserved, without the construction of a subway, and, therefore, there was essentially no necessary relationship be-

tween the construction of the subway and consequent change in grade on one hand, and the conservation of the public safety on the other. On the contrary, it would seem that the primary motive in the construction of the subway and consequent change in the grade of the street was to save the railroad company money in its track elevation work, as, by the construction of the subway, retaining walls of less height were necessary, and much less filling between the walls was required.

It is to be noted that the purpose of the change in the grade of Monroe street is to make possible the continuation of that street, by means of a bridge, across the river. This condition of affairs renders of particular interest, in our consideration, *West Chicago St. R. R. Company v. City*, 201 U. S. 506. In that case, as in the matter before us, the change (in the case cited, in the height of a tunnel extending under the river, and in the matter under consideration, in the grade of a street extending over the river) is rendered necessary by the command of a superior governmental body, the United States of America.

In the case just cited, the City of Chicago had granted to the street railway company authority to construct a tunnel under the Chicago river. Thereafter, the Federal Government concluded to render the Chicago river of greater use by deepening the channel thereof, and a survey of said channel indicated that the tunnel would constitute an obstruction in the channel if so deepened. The United States, therefore, directed the City of Chicago to remove said tunnel from the river, and the city in turn passed an order directing the street car company to remove the tunnel. The company attacked the validity of the ordinance.

At page 523 of its opinion, the court says:

“As already observed, the contention of the company is, in effect, that even if the present tunnel be an obstruction to the navigation of the river by large vessels, the lowering or removal of the tunnel against the company’s will, would be a *taking* of private property for public use without compensation, in violation of the constitutional guarantee of due process of law.

“This result, it is supposed by the railroad company, necessarily follows from the fact that the present tunnel was constructed with the assent of the city, and when constructed was sufficient for purposes of navigation by vessels, of whatever size, then engaged in commerce on the Chicago river. But these facts are not all that must be considered in this discussion. They cannot be considered apart from other matters of a vital character, namely: That the city was under the duty of protecting the free navigation of the river and its branches—a duty from the discharge of which it could not be exempted by any agreement it might make with the railroad company; that the city granted the right to construct the present tunnel under the river subject to the condition, necessarily implied by the statute of 1874 in force when the ordinance of 1888 was adopted, that the tunnel should not interrupt navigation; that if the assent of the company to such a condition was important, it must be held to have given such assent by accepting the ordinance of 1888, into which, as already indicated, must be read the requirement in the statute of 1874 that navigation should not be unnecessarily interrupted; and that the provision in that statute forbidding any interruption of the navigation of the river had reference to the needs of navigation, not only at the time the tunnel was constructed, but its needs at any subsequent period as found and declared by the city upon reasonable grounds; which declaration would, of course, be subject to the condition, vital in our system of government, that the courts may look through and behind mere forms, and interfere, whenever necessary, for the protection of private rights against an illegal, arbitrary exercise of governmental power.”

And continuing further, at page 525, the court says:

“In the case before us the public demands nothing to be done by the railroad company except to remove the obstruction which itself placed and maintains in the river under the condition that navigation should not at any time be thereby interrupted. The removal of such obstruction is all that is needed to protect navigation. So that whatever cost attends the removal of the obstruction must be borne by the railroad company. The condition under which the company placed its tunnel in the river being met by the company, the public has no further demands upon it. This cannot be deemed a

taking of private property for public use or a denial of the equal protection of laws within the meaning of the constitution, but is only the result of the lawful exercise of a governmental power for the common good. This appears from the authorities cited in *Chicago, Burlington & Quincy R. R. Co. v. Drainage Com'rs*, *supra*, just decided. * * * What the city asks, and all that it asks, is that the railroad company be required, in the exercise of its rights and in the use of its property, to respect the public needs as declared by competent authority, upon reasonable grounds, to exist. This is not an arbitrary or unreasonable demand. It does not, in any legal sense, take or appropriate the company's property for the public benefit, but only insists that the company shall not use its property so as to interrupt navigation."

In this connection, we also cite *Chicago, etc. v. Drainage Commissioners*, 200 U. S. 561, which is declaratory of principles practically analogous to those stated in the West Chicago case.

In *Otis Elevator Company v. City*, 263 Ill. 419, the Supreme Court of this state denied the right of the elevator company to recover damages by reason of its deprivation of switch-track connections with a railroad, the tracks of which were elevated, and the elevation of which caused the deprivation. In disposing of this case, the court, at page 424, says:

"In considering what additional classes of cases the framers of the present constitution intended to provide for, the rule adopted was, that it was not the intention to reach every possible injury that might be occasioned by a public improvement, and it was held that to warrant a recovery it must appear there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property and which gives to it an additional value, and by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally."

And speaking further on the subject, the court, at page 428, says:

"It is true that in a suit for damages after a public work has been constructed the measure of the damages

that may be recovered and the rules of evidence are the same as in a condemnation proceeding. (*Aldis v. Union Elevated Railroad Co.*, 203 Ill. 567), but that does not mean that all depreciation of property on account of a public improvement must be compensated for either in condemnation proceedings or in an action on the case for damages."

In *Chicago, etc. R. R. Co. v. Chicago*, 166 U. S. 226, the court had before it practically the same situation involved in *C. & N. W. Ry. Co. v. Chicago*, 140 Ill. 309, heretofore referred to, and it was there contended that, inasmuch as the railroad company would be required to plank its tracks, etc., such expenditures were an element of damages which, under the provision of the constitution, it was entitled to recover. In disposing of this contention the court, at page 251, says:

"It is next contended that error of law was committed by the refusal of the court to allow the company to prove that in the event of the opening of the street it would be necessary, in order that the railroad be properly and safely operated, to construct gates and a tower for operating them, plank the crossing, fill between the rails, put in an extra rail, and to incur an annual expense of depreciations, maintenance, employment of gatemen, etc. It was not claimed that the railroad company could recover specifically on account of such expenditures, but that the proof of their being made necessary by the opening of the street was admissible for the purpose of showing the compensation due to the company. There are some authorities that seem to support the view taken by the railroad company, but we are of opinion that no error was committed in excluding the evidence offered.

"The plaintiff in error took its charter subject to the power of the state to provide for the safety of the public, in so far as the safety of the lives and persons of the people were involved in the operation of the railroad. The company laid its tracks subject to the condition necessarily implied that their use could be so regulated by competent authority as to insure the public safety. And as all property, whether owned by private persons or by corporations, is held subject to the authority of the state to regulate its use in such manner as not to unnecessarily endanger the lives and the personal safety of the people, it is not a condition of the exercise of that

authority that the state shall indemnify the owners of property for the damage or injury resulting from its exercise. Property thus damaged or injured is not, within the meaning of the constitution, taken for public use, nor is the owner deprived of it without due process of law. The requirement that compensation be made for private property taken for public use imposes no restriction upon the inherent power of the state by reasonable regulations to protect the lives and secure the safety of the people.”

We believe that what the property owners will be required to do with reference to Monroe street is practically nothing more than was required of the railroad company in the case last cited, and that in each instance the city is exercising its police power, and that, therefore, in neither instance are the incidental expenditures to be made by the property owner recoverable as damages by reason of Section 13 of Article II of the Constitution of 1870.

In view of the foregoing, we are of the opinion that the city would not be justified in paying the amount of any of the damages in question without first obtaining from the Supreme Court a ruling on two questions, to-wit:

1. Is the city liable for the damages in question when it is acting in the discharge of its police or governmental power?
2. Is the city liable for the damages in question when it is acting in obedience to the command of a superior governmental body—the United States of America?

The situation is such that it might be to the city’s interest to effect a reasonable compromise of the damages under discussion.

Yours truly,

CHARLES M. HAFT,

Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,

Corporation Counsel.

Mayor's Right to Veto Order or Resolution.

June 26, 1915.

HON. WM. HALE THOMPSON, Mayor.

Dear Sir:

Replying to your verbal request for an opinion as to the power of the mayor to veto an order passed, or a resolution adopted, by the City Council, we beg to say:

Section 18 of Article III of the Cities and Villages Act confers upon the mayor the power to veto any ordinance passed by the City Council, by returning the same to the council, with his objections thereto, in writing, at the next regular meeting of the council occurring not less than five days after the passage thereof. The ordinance may then be passed, notwithstanding the veto, by a two-thirds vote, by yeas and nays, of all the members elected to the City Council.

There is an essential difference between an ordinance and an order or resolution of the City Council. Our Supreme Court, in discussing this difference, in the case of *C. & N. P. R. R. Co. v. City of Chicago*, 174 Ill. 439, at pp. 445-446, said:

“A resolution or order is not a law, but merely the form in which the legislative body expresses an opinion. An ordinance prescribes a permanent rule of conduct or government, while a resolution is of a special and temporary character. Acts of legislation by a municipal corporation, which are to have continuing force and effect, must be embodied in ordinances, while mere ministerial acts may be in the form of resolutions, * * * it is well settled, that acts of municipal corporations, which are legislative in their character, must be put in the form of ordinances, and not of mere resolutions.”

In the case of *People v. Mount*, 186 Ill. 560, at page 571, the Supreme Court used the following language:

“A municipality can only legislate through the passage of ordinances, and not by the passage of mere resolutions. It is well settled, that acts of legislation by a municipal corporation, which prescribe a permanent rule of conduct or government, and which are to have

a continuing force and effect, must be established by ordinance. (*Chicago and Northern Pacific Railroad Co. v. City of Chicago*, 174 Ill. 439; *Village of Altamont v. Baltimore and Ohio Southwestern Railway Co.*, 184 *id.* 47.) 'So, matters upon which the council wishes to legislate must be put in the form of an ordinance, and all acts that are done in its ministerial capacity may be in the form of resolutions.' (17 Am. & Eng. Ency. of Law, p. 236.)"

The language quoted from the above cases is quoted with approval, or language to similar effect used, in many cases and in textbooks dealing with the subject matter. (*Village of Altamont v. B. & O. S. W. Ry. Co.*, 184 Ill. 47, 51; *City of Paxton v. Bogardus*, 201 Ill. 628, 640; *Call v. People*, 201 Ill. 499, 502; *Village of London Mills v. White*, 208 Ill. 289, 301; *Bullis v. City of Chicago*, 235 Ill. 472, 477; Horr & Bemis on Mun. Police Ordinances, Sec. 210; McQuillin on Mun. Corp., Secs. 633-635; Dillon on Mun. Corp., 5th Ed., Sec. 571; 28 Cyc. 348.)

A resolution may be adopted, or an order passed, as a resolution or order, by a majority of a quorum present, whereas an ordinance requires a majority of all the members elected in the city council. (*Hibbard v. City of Chicago*, 173 Ill. 91, 97; *People v. Mount*, *supra*, p. 575.)

Mere resolutions, relating to matters which are properly the subject of resolutions, do not need to be submitted to the mayor for his approval. (*People v. Mount*, *supra*, p. 574; *Village of London Mills v. White*, *supra*, p. 302.)

Where the charter of a municipality and the statute is silent as to the mode in which the city council shall perform an act, the decision of the council may be evidenced by a resolution, an order or an ordinance. In such case the mere form will not affect the validity of the action of the council if it is adopted with all the formalities required in the case of an ordinance. The substance and not the form of the corporate act is what governs. (Dillon on Mun. Corp., 5th Ed., Sec. 571; *City of Chicago v. McKechney*, 91 Ill. App. 442, 454.)

The doctrine is stated thus in McQuillin on Mun. Corp., Sec. 333:

“Where the resolution is passed with all the formality of an ordinance, it thereby becomes a legislative act, and it is immaterial whether called an ordinance or a resolution.”

The Supreme Court, in the Mount case, *supra*, after citing Section 1 of Article III of the Cities and Villages Act, which provides that “the city council shall consist of the mayor and aldermen,” and after stating that the mayor is thus made by express statutory provision a part of the common council and has a right to take part in the legislation passed by the common council, and after quoting the statutory provisions in regard to veto by the mayor, uses the following language in respect to such veto power (p. 574) :

“It thus appears, that the mayor has the veto power in reference to legislation passed by the common council, and that, where he exercises that veto power, such legislation cannot be effective, unless it is passed by two-thirds of all the members elected to the common council. The mayor is thus vested by law with the power, and has imposed upon him the duty, of supervising all legislative enactments by the city council. He is clothed with the duty of exercising a veto for the purpose of making this supervisory power effectual. This supervision by the mayor over municipal legislation was evidently intended by the legislature to operate as a check upon hasty and unwise legislation.

“Mere resolutions do not need to be submitted to the mayor for his approval. (Horr & Bemis on Mun. Police Ordinances, Sec. 210; *Burlington v. Dennison*, 42 N. J. L. 165.) The wise and salutary provision of the statute, which clothes the mayor with the veto power, may be defeated by a city council by the simple election on its part to change the form of its legislative acts into resolutions, instead of embodying them in ordinances, if it be true that municipal legislation can be accomplished by mere resolutions. The case at bar furnishes an instance of the danger of allowing important municipal legislation to take the form of a resolution, in that it destroys the supervisory power of the mayor of the city. It is well said by the Appellate Court in their opinion, delivered upon the decision of this case: ‘While, therefore, it requires eight votes to pass an ordinance of the city and ten votes to pass it over a veto, a majority of a quorum or five members of the council can pass a resolution, and the mayor cannot interfere with it.’ ”

The opinion in the same case, in referring to the necessity for the councilmen to act in conjunction with the mayor in legislative action, says, at p. 575:

“Dillon in his work on *Municipal Corporations* (Vol. 1, 4th Ed., Sec. 273), says: ‘Where the power to legislate for the corporation is vested in the mayor and councilmen, the council by itself cannot legislate, but must act in conjunction with the mayor. In deciding the point the court observes: ‘If a simple resolution (instead of an ordinance) would be sufficient, yet, before it would have any validity, it would necessarily have to be signed by the mayor as a part of the law-making power; the co-ordinate action of both is required.’ (*Saxton v. Beach*, 50 Mo. 488; *Saxton v. St. Joseph*, 60 *id.* 153; 1 Dillon on Mun. Corp., 4th Ed., Sec. 271.) ‘Where the charter vests the affairs of a city in the hands of the mayor and councilmen, the city council has no power except to act in conjunction with the mayor.’ (15 Am. & Eng. Ency. of Law, p. 1032; 1 Dillon on Mun. Corp., 4th Ed., Secs. 309, 246.)”

McQuillin on Mun. Corp., Sec. 633, in referring to the necessity of the approval of all legislative acts by the mayor, says:

“Where the mayor is a constituent part of the legislative power his approval of all legislative acts is necessary to their validity.”

We conclude from the foregoing that it may be stated as a general rule that acts that are done by the City Council in its ministerial capacity (mere ministerial acts) may be in the form of resolutions or orders, which do not need to be submitted to the mayor for his approval, and consequently are not subject to his veto; but that all legislative acts of the City Council should be in the form of ordinances, and, whether in the form of ordinances or resolutions or orders, are subject to the veto power of the mayor.

While the foregoing is the general rule, its application must necessarily in each case be determined by consideration of the particular council action under consideration. If the action takes the form of an ordinance, such ordinance is in all cases subject to veto by the mayor. If the action takes the form of a resolution or an order and is merely an expres-

sion of the opinion of the City Council, or if it relates to a mere ministerial act, then the resolution or order is not subject to veto; but if such action, while in the form of a resolution or order, concerns a subject which is legislative in its character, then the resolution or order is subject to veto by the mayor.

In reference to the order in respect to the investigation of the Board of Education, passed by the City Council on June 14, 1915, and appearing at page 639, *et seq.*, of the Journal of the Proceedings of the City Council of that date, which we understand was the immediate occasion of your request for this opinion, we are of the opinion that such order was subject to your veto. It orders the Committee on Schools, etc., through its sub-committee, to make demand for access to the books, etc., and also orders that said sub-committee take such steps and institute such legal proceedings, through its counsel, as may be necessary to compel the Board of Education to place at the disposal of the said sub-committee all books, etc., that it may desire for the purpose of its investigation. If the sub-committee should institute legal proceedings through its counsel, as directed in the order, such action would create a liability against the city and necessitate the expenditure of its money, and council action ordering the same is, in our opinion, legislative in its character and subject to veto by the mayor.

Yours respectfully,

BRYAN Y. CRAIG,

First Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,

Corporation Counsel.

Manner of Keeping Accounts of School and Library Funds.

June 28, 1915.

HON. CHARLES H. SERGEL, City Treasurer.

Dear Sir:

Your letters of recent date relative to the manner of

keeping accounts of School and Library funds was referred to the undersigned for consideration and reply.

You call attention to Section 6 of Article VII of the Cities and Villages Act, which requires that the city treasurer "shall keep a separate account of each fund or appropriation, and the debits and credits belonging thereto," and you ask whether this imposes on you the duty of opening and keeping a separate account for each appropriation made by the Board of Education or by the Board of Directors of the Chicago Public Library. The custom heretofore has been to pay out the money from the school and library funds on warrants duly signed and to charge same up against the entire fund without taking into account the precise sums appropriated in each instance by these bodies for the purposes for which such warrants were drawn.

This question has no doubt arisen on account of the recent decision of our Supreme Court in the case of *People ex rel. Cameron v. Flynn*, 265 Ill. 414, where it was held that certain provisions of the Cities and Villages Act controlled the conduct of the city treasurer with respect to the handling of school funds.

We do not believe that the opinion of the court in the case just mentioned requires that there should be any change in the method heretofore in vogue in regard to the accounts kept of these funds. The reason for requiring the city treasurer to keep separate accounts of appropriations made by the City Council may be gathered from the statutes, and this reason does not apply in the case of the school and library funds.

The City Council, in making its appropriations, is required by the act above mentioned to specify the objects and purposes for which such appropriations are made, and the amount appropriated for each object or purpose. (Art. VII, Sec. 2.) All officers are prohibited from incurring any expense unless an appropriation shall have been previously made concerning such expense.

It thus appears that the city can only expend money (except in extraordinary cases) through the means of a budget which must be rigidly lived up to, and in order that this may

be done the treasurer is obliged to keep separate accounts of the items and to limit the expenditures of moneys under each item to the sums originally credited to such items.

No such duty or obligation is placed on either of the two boards of which you speak. It is true they are required to make estimates of their expenses, but the law does not direct them to itemize the figures nor to keep their expenditures under each item within the figure originally determined upon as a proper amount for such purpose. They are not even required to present their budget to the City Council for the purposes of the tax levy.

Hence, there would be no reason for keeping separate accounts of the items in the budget. It is even possible that in the absence of any statute to the contrary, these boards could draw valid warrants against the entire fund in each case until such fund was exhausted, regardless of whether any particular item had been overdrawn or not, although we are not disposed to concede this, and do not wish to be understood as sanctioning such a practice.

That the Supreme Court, in the case above cited, looked upon the school moneys merely in the light of a special fund which to all intents and purposes is to be handled the same as any other special fund, such as a fund levied and collected for special assessment purposes, appears plain from the following language:

“* * * Section 12 of Article 7 of the Cities and Villages Act provides that ‘all moneys received on any special assessment shall be held by the treasurer as a special fund, to be applied to the payment of the improvement for which the assessment was made, and said money shall be used for no other purpose whatever, unless to reimburse such corporation for money expended for such improvement.’ The language of Section 137 of the School Law, in so far as the duties of the treasurer are concerned with respect to that fund, is identical with that of Section 12, *supra*. In each instance the statute directs the money realized from such special assessment or school levy *shall be held by the city treasurer as a special fund*. The duties of the treasurer with respect to each fund are therefore, in so far as its identity as a fund is concerned, the same. In each instance each fund

is to be held by him as a special fund, to be applied to a special purpose. * * *

“Section 137 of the School law does not require that the city treasurer shall *deposit* the school funds as a special fund, but only requires that they shall be held by him as a special fund for the payment of the indebtedness properly chargeable against that particular fund, the same as special assessments are to be held for the purpose of paying for the cost of an improvement. * * *”

People ex rel. Cameron v. Flynn, 265 Ill. 414-427.
(The italics are the court's.)

The library fund is on exactly the same footing as the school fund. The powers given the board of directors of the library under Section 5 of the Library Act are practically identical with the powers of the school board with respect to the handling of its funds.

We therefore see no reason for opening up a separate account for each appropriation made by these boards.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,
Corporation Counsel.

Frontage Consents for Lumber Yards.

June 29, 1915.

HON. CHARLES J. FORSBERG, City Collector.

Dear Sir:

There has been filed with the city an application for a license to conduct a lumber yard at 1143 South Fairfield avenue. There were also filed with the application certain consents of property owners as required by Section 664 of The Chicago Code of 1911, as amended. The frontage consent petition was referred to the Map Department for verification, and the Map Department reported to the Building Department that said petition contained a surplus of frontage

of 832.52 feet. The Building Department and your department were about to issue a permit and a license for this lumber yard, when protests were made by certain property owners and the Board of Education against the issuance thereof. The grounds urged by the remonstrants, as reasons why this permit and license should not be granted, more fully hereinafter appear.

After notice was given to the various remonstrants as to the time and date thereof a hearing was had on the objections. The protestants and applicants were both represented by counsel at said hearing. The objections urged by the remonstrants are purely legal, wherefore you have requested me to pass upon the sufficiency thereof.

Section 664 of The Chicago Code of 1911, as amended, provides as follows:

“664. LUMBER YARDS—NOT TO BE LOCATED NEAR RESIDENCE EXCEPT BY CONSENT.) No person or corporation shall establish, maintain, conduct or operate within the fire limits of the city, as the same are now and may hereafter be defined by ordinance, any lumber yard or place where new or second-hand lumber is kept for sale or is stored for seasoning or drying on any premises fronting on any street in any block where two-thirds of the buildings on any street surrounding any such block are used exclusively for residence purposes, unless the written consent of the owners of a majority of the frontage on both sides of all the streets surrounding the block in which it is proposed to locate, establish, conduct or maintain such lumber yard or place, be first obtained by the person or corporation desiring to establish, maintain or operate such lumber yard or place, consenting to the issuance of a permit from the Department of Buildings and also consenting that a license for the establishment, keeping or maintenance of such lumber yard or place shall be issued by the city. Such written consent shall accompany the application for a license and building permit made by such person or corporation.”

It is, therefore, necessary under the provisions of this section that the proper frontage consents be obtained before a license or permit can be issued for such lumber yard.

Since the report of the Map Department was made there

has been filed with the city collector the following withdrawals from said petition:

Christ Schliken	25 feet
Jennie Scherer	12½ feet
Franteska Smidl	24 feet
Mary A. O'Connell	25 feet
Total.....	86½ feet

The validity of these withdrawals are not denied by the applicant. Therefore, the net surplusage must be figured as 746.2 feet.

Since the applicant has complied with said Section 664 and the other sections of the said ordinances relating to licenses for lumber yards, it becomes the duty of the city to issue such license unless the objections urged by the protestants can be sustained.

These objections may be categorically stated as follows:

(a) That the frontage consent petition does not set forth the name of the applicant.

(b) That there does not appear to be any authority shown by the official who placed thereon the name of the Allis-Chalmers Manufacturing Co., one of the signers to said petition.

(c) That the signature of P. McAuliffe, by W. H. Rogers, is not sufficient because there is no showing of the agency of said Rogers.

(d) A similar objection is made to the signature of the B. & O. C. T. R. R. Co., by L. G. Curtis, D. E., for the reason that there is no showing of authority on the part of said Curtis to sign for said company.

(e) It appears from the petition that the Allis-Chalmers Manufacturing Company has signed for a certain amount of frontage, naming certain lots. Objectors claim that such designation limited the company's consent to the amount of frontage for which it signed, whereas the Map Department has given said applicant credit for all the frontage owned by the company, being an amount in excess of the amount scheduled on the consent petition.

(f) That it must appear on the face of the petition

that the applicant has obtained a majority of the frontage on both sides of each of the four streets and not a majority of the total frontage on both sides of the four streets around the block.

These objections can best be answered seriatim, and therefore I have considered them in that order:

(a) The frontage petition reads as follows:

“We, the undersigned, owners of the property respectively set forth after our names herein, do hereby consent to the issuance of a permit for the establishment and a license for the maintenance of a lumber yard on 1123 to 1143 S. Fairfield avenue.”

The language of said Section 664 provides in substance that “the person or corporation desiring to establish, maintain or operate such lumber yard or place” must obtain the written consent of property owners “consenting to the issuance of a permit * * * and that a license for the establishing, keeping or maintenance of such lumber yard or place shall be issued.” It is further provided that such written consents shall accompany the written application for a license. This section fails to state that the name of any applicant must appear on the face of the petition. In view of its silence on this point, it is my opinion that it is not for this department to say that the property owners cannot sign a blank consent without limiting the same to any particular person or persons. Certainly it appears to me that the objectors can not take advantage of such an omission. All that is required, in my opinion, is a substantial compliance with the ordinance, and I, therefore, feel that this objection is hyper-critical and should be disregarded.

On objections (b), (c) and (d) this department has already committed itself. In an opinion dated February 29, 1904, the Law Department ruled, following the case of *McVey v. City of Danville*, 188 Ill. 428, that it is not necessary “that the authority of the agent to sign such a petition should accompany the petition or appear on the face of it. (*Tibbets v. West and South Towns Street Railway Co.*, 153 Ill. 147.)” (See Vol. 2, Opns. Corp. Coun., 763-6.) For which reason, I hold these objections not well founded.

(e) The ordinance provides that the "written consent" of the signers of a majority of the "frontage" must be obtained. I believe that a frontage consent must be either given or rejected *in toto*. The object of obtaining frontage consents is to influence the department in reaching some conclusion in determining where lumber yards may be located. In an analogous case where consents were required for a livery stable, our Supreme Court laid down the rule that the property owners "are simply allowed to waive the right to insist upon the enforcement of a legal prohibition which was adopted for their benefit and comfort." (*Chicago v. Stratton*, 162 Ill. 494, 501.) Having signed a consent to establish a lumber yard, it would seem to me a violent presumption to hold that the Allis-Chalmers Manufacturing Company did not wish to be accounted entirely in favor thereof, having manifestly through inadvertence failed to name all its holdings on the petition. To hold thus would, in effect, allow a petitioner both to agree to and reject the proposition. Our courts have held that the signing of a consent estops the petitioner from objecting that the petition was not sufficiently signed. (*Joyce v. East St. Louis Electric Street Railway Co.*, 43 Ill. App. 157.) Being thus estopped, how can anyone take advantage of that which the petitioner could not. I, therefore, think that this objection is frivolous and should not be sustained.

(f) This objection hinges upon the meaning of the phrase "on both sides of all the streets." In my opinion in order to hold with the objectors, I must assume that the City Council had intended to say "of each of the streets." The word "all" is a most comprehensive word. As defined in the Century Dictionary, it means "the whole number of, with reference to individuals or particulars taken collectively; the aggregate; the total"—or, as Webster says, "the whole quantity, the whole number." The decisions of various courts have followed these definitions. (*Joslin v. Williams*, 76 Neb. 594; *Haverly v. Elliott*, 39 Neb. 201; *Beckstead v. Griffith*, 11 Idaho, 738; *State v. Maine Central Railroad Co.*, 66 Me. 488.)

Since the City Council found it advisable to thus word this part of said section, it is my opinion, based on the above authorities, that it was intended that the aggregate total

frontage of all the streets should be considered in determining what is a majority thereof. This opinion is consistent with an opinion rendered by this department on December 11, 1913 (page 609, Vol. 6, Opns. Corp. Coun.), in which opinion a section of an ordinance relating to ice plants, somewhat similar to the one under consideration, was construed.

Numerous cogent, moral and aesthetic reasons were offered by the Board of Education why this permit and license should not be issued. Said reasons were based on the proximity of said lumber yard to the Thomas Chalmers Public School, situated across the street from the proposed lumber yard. It seems to me that it would take very little argument to convince any reasonable person that the location of a lumber yard so near to a public school is an undesirable, if not a dangerous proposition; but, unfortunately, Section 664 does not prohibit the location of a lumber yard within any specified distance from a public school. Mr. Sexton, then corporation counsel, on January 13, 1914, rendered an opinion to the Board of Education that, "unless some of the frontage consents sufficient to reduce the total to less than one-half of all the frontage are revoked, it will be necessary for the permit to be issued."

From the contents of that opinion, you will see that it was the opinion of the corporation counsel that the Board of Education could not object to the location of said lumber yard on the grounds last above stated.

In view of the fact that I have been unable to find any grounds urged by the protestants upon which said license should be refused, I beg to advise you that the applicants have sufficient surplusage of frontage consents. It is, therefore, your duty to issue a license to conduct said lumber yard.

Yours very truly,

LOUIS SALINGER,

Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,

Corporation Counsel.

Redemption of Bonds in Europe.

June 29, 1915.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

We are in receipt of your letter of recent date to which is attached copy of a letter from Speyer & Company of New York, requesting that you authorize the redemption of bonds of the city about to mature at their European houses, without presentation to the city treasurer, as provided for in the bonds.

It appears that a large part of the maturing water loan and river improvement bonds are still held abroad, and that, owing to the prohibitive insurance rates prevailing at the present time, it would be a great convenience to the European holders of these bonds if they could be redeemed at the London and Frankfort houses of this concern, and you ask whether there is any legal obstacle in the way of doing this.

So far as the legal aspect of this matter is concerned, we know of nothing that would prevent you from authorizing these European houses to act as your agents in redeeming these bonds. This could be done by European houses as well as by Chicago or New York banks which are sometimes appointed by the city comptroller as the agents of the city in the matter of redemptions of this character.

Whatever risk is attached to the proceeding, however, would be your own personal risk; and in this connection we deem it our duty to call your attention to the extraordinary hazard of the proceeding contemplated under present conditions. While the war continues, there is a possibility of one of the cities becoming the center of hostilities, and even the most carefully prepared records of redemption might, under such circumstances, be destroyed. If such a thing should happen, there is no telling how long it would take to straighten out the matter on the books of the city, and claims might arise that are wholly unlooked for. We could enlarge on these possibilities, but see no reason for doing so, since

you must understand as well as the writer what extraordinary conditions sometimes arise as the result of a great war, and we feel that we have done all that is required of us when we have called your attention to the personal risk you run.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,

Corporation Counsel.

New Bond to Be Given on Change of Location of Licensee.

July 1, 1915.

HON. JOHN SIMAN, City Clerk.

Dear Sir:

You recently referred to this department for an opinion, the question of whether, in case of a license issued under the city ordinances for which a bond was required at the time the license was issued, a new bond should be required when the licensee is authorized to make a change in his location as provided in Section 1523 of The Chicago Code of 1911.

It is a well settled rule of law, relative to the construction of bonds, that no implications are to be made in giving construction to the terms of an obligation not clearly embraced within the language used, and that sureties are only chargeable according to the strict terms of the bond. (See 5 Cyc. 758.)

Unless there is something in the form of the bond which would permit the change of location on the part of the licensee, it seems to me that it is a dangerous proposition for the city to authorize a licensee to change his location without requiring that a new bond be given. Such change of location may be construed as an added liability not within the contemplation of the contracting parties. On the other hand, courts might hold that the city had a right to authorize such change without added liability.

In view of the many possible advantages that can be taken by the surety of technicalities in the forms of such bonds, it is my opinion that as a matter of precaution, a new bond should be required in each case where a change of location has been authorized by the city, unless the form of the bond is so worded as to provide for such change of location.

Very truly yours,

LOUIS SALINGER,
Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,
Corporation Counsel.

Erection of Temporary Structures Near Bathing Beach.

July 2, 1915.

HON. CHARLES BOSTROM, Commissioner of Buildings.

Dear Sir:

You requested this department to furnish you an opinion with reference to tents recently erected and now being erected along the west side of Lake avenue between Seventy-second and Seventy-seventh streets. You state that these tents have wooden floors and the rest of the tent is made of canvas. No application has been made for permits in connection with the erection of such tents. Your department desires to know whether or not it has jurisdiction in connection with the erection and maintenance of *temporary structures* of this nature.

Mr. Clevinger of your department informs us that the tents are used for various purposes. Some are used as habitations, others are used for dressing rooms by bathers, and one tent is used as a place for the sale of refreshments. Mr. Clevinger also states that all these tents are used during the warm months only and will be removed at the end of the summer season.

We do not believe your department has any jurisdiction in the matter, assuming that the tents are "*temporary structures*." While the ordinances do not distinguish between temporary and permanent structures, yet we do not believe it was the intention of the council that the regulations con-

tained in the building chapter should apply to any other than permanent structures used for the purposes set forth in the various building classes. Any other construction would prevent individuals from sleeping in tents in their back yards unless permits were first secured and unless the tents complied in every way with the building regulations as to exits, ventilation and so on.

In holding as we do that your department has no jurisdiction relative to the tents referred to in your letter, we do not overlook an opinion addressed to Hon. Murdoch Campbell, Commissioner of Buildings, dated June 5, 1911, where we held that the tent at the northwest corner of Wilson and Clarendon avenues was required to comply with the building regulations. This tent, which was used as an ice cream parlor, had a wooden floor placed on the ground and contained the usual and ordinary equipment of ice cream parlors, such as tables, chairs, an ice cream fountain, the ordinary utensils connected therewith and a ten foot counter. The tent was of unusual size, capable of housing large numbers of persons, and therefore it became a proposition where the safety of the public was involved.

The present opinion is based solely upon the assumption that the tents in question are *temporary structures* to be removed at the end of the summer season and that there is no question involving the safety of the general public.

Very respectfully,

MAX M. KORSHAK,

Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,

Corporation Counsel.

Discharge of Captains and Lieutenants from Police Force on Account of Age.

July 6, 1915.

HON. WM. HALE THOMPSON, Mayor.

Dear Sir:

Under date of July 2, 1915, you requested an opinion upon points raised by Alderman Thomas J. Lynch, Chairman

of the Committee on Schools, Fire, Police and Civil Service, in a letter of the same date addressed to Your Honor. Alderman Lynch desires to know the authority of the general superintendent of police for discharging captains and lieutenants of the Police Department on account of age. He states that he is unable to find any law giving the general superintendent of police the right to use his discretion in determining who shall or who shall not be pensioned, and further sets forth that such officers are executives and can execute their authority without being in the best physical condition.

In complying with your request, it would seem that the points to be considered are:

First. The rights of the general superintendent in the premises in regard to those officers who are commonly known as "holdovers."

Second. The rights of the general superintendent as to officers who are in the service under the provisions of the city civil service law; and

Third. The rights of both classes of officers so far as pensions are involved.

I have conferred briefly with General Superintendent Healey upon this matter and am informed by him that the officers in question are persons who have served from eight to twenty-one years over the twenty-year pension period, and that they are men from eight to seventeen years over the fifty years age limit, and that the retirement contemplated is upon pension, after physical or other examination, if desired by the officer, by a board to be selected by the Civil Service Commission, thereby removing from the method of retirement any arbitrary features and making such retirement depend solely upon the question of physical fitness and efficiency for retention in the service or discharge therefrom.

The term "holdover," as used in connection with a public office or position which has been brought within the operation of the civil service law, is merely used to designate an officer or employe who was appointed prior to the taking effect of the civil service law (the date of adoption of which in this city was April 2, 1895), and who has continued to occupy and perform the duties of such office or position without further authority than the original appointment.

In *Stott v. City of Chicago*, 98 Ill. App. 105, the court, at page 107, in commenting upon the case of *McNeill v. City*, 93 Ill. App. 124, said:

“We held in that case that inasmuch as the petitioner was not an appointee under the Civil Service Act, but was what is termed a ‘holdover,’ he was subject to removal without reference to the provisions of the Civil Service Act * * *.”

Also, on the same page—

“Relator, as a ‘holdover’ was not within the protection afforded by Section 12 of the Civil Service Act, which regulates the manner of discharge of persons holding as appointees under the act.”

This case was affirmed by the Supreme Court, in *Stott v. City of Chicago*, 205 Ill. 281.

In the *McNeill* case, *supra*, Mr. Justice Windes, 93 Ill. App. at page 127, quoting from an opinion of Judge Tuley, says:

“The civil service law did not affect the tenure of office or the power of removal of such holdovers.”

To the like effect is the holding in *People v. City of Chicago*, 104 Ill. App. 250, which was affirmed by the Supreme Court in 210 Ill. 479.

The police officer appointed under the provisions of the Civil Service Act is entitled to the protection of the act with reference to security in removal from office. Section 12 of the act provides:

“No officer or employee in the classified civil service of any city who shall have been appointed under said rules and after said examination, shall be removed, or discharged except for cause, upon written charges and after an opportunity to be heard in his own defense. Such charges shall be investigated by or before said Civil Service Commission, or by or before some officer or board appointed by said commission, to conduct such investigation. The finding and decision of such commission or investigating officer or board, when approved by said commission, shall be certified to the appointing officer, and shall be forthwith enforced by such officer” * * *.

It is to be noted that the statute does not define or specify

what constitutes "cause," and in *Kammann v. City of Chicago*, 222 Ill. 63, it was held:

"The statute is silent as to what constitutes 'cause.' Manifestly the right to determine that question is left with the Civil Service Commission, and we have held that this statute does not require the commission to specify, in written rules, every case which shall be deemed cause for removal. *Joyce v. City of Chicago*, 216 Ill. 466."

It has been held by the Appellate Court, however, that cause for removal must be some substantial shortcoming on the part of the incumbent which renders his continuance in office or employment in some material way detrimental to the discipline or efficiency of the service. (*Joyce v. City*, 120 Ill. App. 398; affirmed 216 Ill. 466.)

A case similar to those now under consideration is found in the discharge of Lieutenant Richard J. Moore on March 6, 1905, by Francis O'Neil, General Superintendent of Police, general order No. 21, "from the force, for superannuation * * * being eligible to retirement on pension." Under date of April 7, 1905, Edgar B. Tolman, Esq., then corporation counsel, rendered an opinion to the mayor upon this matter in which the following language is used:

"There are two classes of pensioners, one class being those who have incurred physical disability 'while in and in consequence of the performance of duty,' the other being those who have served more than twenty years on the regular police force and have reached the age of fifty years. This department has heretofore discussed the status of these two classes of pensioners, and it has been held that the disability pensioners are merely retired from active service but still remain members of the force. The superannuated pensioner, however, cannot become a pensioner until his connection with the force has terminated. This is a condition precedent to his becoming a pensioner.

"Since Richard J. Moore was a 'holdover' the Civil Service Commission have no jurisdiction over him."

As bearing upon the question of pension, I also call attention to an opinion dated January 20, 1904, by John W. Beckwith, Assistant Corporation Counsel, afterward corporation counsel, in which he states as follows:

"In my opinion, the law contemplates the retirement of an officer from the service or the severance of his connection with said force before a pension can be claimed."

In *Joyce v. City of Chicago*, 120 Ill. App. 398, the court, at pages 403 and 404 says:

"Before the civil service law was enacted, a police officer of the City of Chicago was subject to arbitrary discharge by the mayor, although such removal must be reported to the Council.

"The Civil Service Act, to prevent removal for political reasons, provided that no person in the classified service could be removed from his office or employment 'except for cause upon written charges, and after an opportunity to be heard in his own defense.' This implies, of course, that the written charges must state a 'cause' for removal and that this cause must be some substantial shortcoming, which renders his continuance in his office or employment in some way detrimental to the discipline or efficiency of the service. But, as we said in *Heaney v. Chicago*, *supra*, when that is conceded, a wide latitude is given to the commission as to what will justify the separation from the service, provided only the accused has been given the proper opportunity to know the nature of the charges and to be heard in his own defense."

This case was affirmed in *Joyce v. The City*, 216 Ill. 466.

In the case of *City of Chicago v. Condell*, 124 Ill. App. 64, at page 73, the court uses substantially the same language as above. This was also the meaning of the word "cause," as defined by the Supreme Court of New York, in *People v. Fire Commissioners of the City of New York*, 72 N. Y. 445, 449, where, in construing a similar provision, "cause" was further said to be something "which the law and a sound public opinion will recognize as a good cause for his no longer occupying the place."

Section 1926 of The Chicago Code of 1911 is as follows:

"DISCIPLINE OF OFFICERS, ETC.) The general superintendent of police shall hear and determine all cases not under the jurisdiction of any trial board authorized by law, for the violation of any rule, regulation or order of said department, or other breach of discipline, and shall have power to punish the offending party by reprimand,

or forfeiture of pay for a specified time, or dismissal from the force.”

Alderman Lynch in his letter asserts “that lieutenants and captains are executives, and can execute their authority without being in the best physical condition.” While there may be an element or measure of truth in this statement, it is a proposition that cannot be pushed too far and certainly not very far in connection with police service. Probably the same degree of physical endurance may not be required of a commanding officer that is exacted of a patrolman traveling a beat, but it can scarcely be questioned that the commanding officer of a police force must necessarily possess a high degree of physical endurance and alertness if he is to perform good and efficient service for the public. Where vigilant service is required in the command and discipline of a force of vigorous men, a reasonably vigorous body is necessary to an active and vigorous executive mind. And it is to determine the question whether certain officers, who have attained the retirement age, are physically fit to perform longer for the public the duties and services of their respective positions or whether they should be discharged and the public be given the services of younger and more vigorous men. The foregoing, in view of what has been said in preceding paragraphs, I am of the opinion embodies a proper question of “cause” within the meaning of the law, for discharge from the service if the finding should be adverse to the officer.

It ordinarily goes without saying, from the very nature of things, that when the law has created a department and in express terms has marked out the legal bounds of such department, it presupposes or necessarily implies in the absence of express restriction to the contrary, the executive head of such department has both the authority and power to execute the purposes within the scope of such bounds for which it was created. This scope includes reasonable, executive and administrative discretion, and as applied to the Police Department has to do with discipline and efficiency of the force, and the preservation of the rights and interests of the general public as well as a proper consideration for the rights and interests

of the men who compose the force. This does not mean that the general superintendent is an autocrat, neither does it mean that he is devoid of power and discretion in the particulars mentioned; but it does mean that there is implied power to act freely as to all "holdovers," and a wide latitude in formulating a charge which may constitute a substantial shortcoming or detriment to the discipline of efficiency of the service as to those members of the force who are under civil service.

I am therefore of the opinion that the general superintendent of police will be acting clearly within his rights and powers to discharge any "holdovers" at any time he may deem such discharge to be in the interest of the public. If, however, he desires to give such officers the benefit of a physical examination it is within his discretion so to do.

I am further of the opinion that he will likewise be acting clearly within his rights and powers to file written charges with the Civil Service Commission, setting forth the physical disability of officers under civil service to perform properly their duties, and to discharge the same if the finding of the commission is adverse to such officers.

Respectfully submitted,

JAMES G. SKINNER,
Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,
Corporation Counsel.

**Right to Collect for Replacement of Bursted Water Meters,
Stolen or Missing Meters, Etc.**

July 10, 1915.

HON. W. M. MOORHOUSE, Commissioner of Public Works.

Dear Sir:

In reply to your letter and that of the Hon. James A. Kearns, Chairman of the Sub-committee on Claims of the Finance Committee, dated July 7, 1915, asking for an opinion

as to the right of the city to charge and collect for the replacement of bursted water meters, stolen or missing meters, and for repairs made by the city thereon, due to the negligence in not caring for the meters in vacant or partially occupied premises and in vaults outside of the property supplied, etc., we beg herewith to state as follows:

Section 2748 of The Chicago Code of 1911, in relation to the installation and maintenance of meters is as follows:

“2748. CITY TO PROVIDE METER.) At every building, structure or premises of the kind mentioned in Sections 2747 and 2785, that is supplied with water from the Chicago waterworks system, there shall be furnished and installed a *water meter* for the purpose of controlling and measuring such water supply, which said meter shall be *furnished, installed and maintained* at the *cost and expense* of the city, and whenever the building, structure or premises aforesaid which now receives its domestic supply of water through two or more service pipes, these said several service pipes must be joined together by and at the expense of the City of Chicago; provided, however, it shall be optional with the City of Chicago to install a new single service pipe equal to the domestic requirements of the aforesaid building, structure or premises to which the several house service pipes must be joined, which must be done at the cost and expense of the City of Chicago; provided, further, it is optional with the City of Chicago to install a meter on each service pipe found supplying water to premises to be metered.”

From the above ordinance, it appears to be the plain and obvious duty of the City of Chicago to furnish, install and maintain, at its cost and expense, all water meters wherever required by ordinance while said ordinance is in force; and in this connection, we must hold that the words “maintain at the cost and expense of the city” contemplate and mean that when said meters are out of repair it is the duty of the City of Chicago to repair said meters at the expense of the City of Chicago.

Section 2776 of The Chicago Code of 1911, in relation to when meters are to be enclosed within boxes or vaults, is as follows:

“2776. LOCATION OF METER—FREE ENTRY TO PREM-

ISES, ETC.) *Water meters* shall be located at *such place*, within or without the premises, and in such manner as the commissioner of public works shall direct. *Boxes or vaults* in which meters are to be placed shall be made *in accordance with specifications to be prescribed by the commissioner of public works*. If any water meter is installed or located within any building, structure or premises, the owner or person in possession, charge or control thereof shall at all times permit the commissioner of public works or any duly authorized officer or employe of the Department of Public Works free entry, for the purpose of examining, testing, reading or repairing such meter; and in the event that such owner or person in possession, charge or control of such premises shall refuse or fail to permit such entry or shall in any way obstruct or cause to be obstructed such entry, the water supply to such premises shall forthwith be cut off."

Inasmuch as the above ordinance prescribes the specifications for and manner in which boxes or vaults shall be built and installed, and gives the commissioner of public works discretion as to where they should be placed, in our opinion it follows under said ordinance that, wherever a box or vault for a meter is necessary, the consumer must build it and maintain it.

As to the other part of your letter, we believe that the City of Chicago cannot recover for the replacement of a bursted water meter caused by frost, or any other act not within the control of the water consumer; because the first is an act of God, and the latter circumstance is beyond the control of the consumer. We believe, also, it cannot recover for either stolen or missing meters, as a water consumer is not responsible for the felonious acts of third persons unless the city can connect the water consumer with the act of theft or conversion. It also follows that the City of Chicago, by reason of its selection of the location of a meter, under Section 2776 above set forth, and because it owns the meter, must make all necessary repairs to any of its meters for any cause whatsoever, except where the water consumer wilfully destroys the meter or procures the same to be done, or, in making repairs on his own building, by negligence or want of

care he damages or destroys the meter by his own act or the act of his agent.

It is also our opinion, that if the city contemplated charging up the installation of all water meters and the maintenance of the same against the water consumer, or felt it had a right to do so, it would have done so by proper and appropriate general ordinances.

Relative to the validity and propriety of the application contract form known as "B W—300," we desire to say that in the case of *Wagner v. City of Rock Island*, 146 Ill. 152, as regards the contractual relation of the city and the water consumer, the court says:

"* * * But water rates are imposed and collected merely as the compensation or equivalent to be paid by those who choose to receive and use the water, for the commodity thus furnished them by the city. No one is compelled to receive or use the water so as to be under obligation to pay for it, except at his own election, and when he does receive and use it, with knowledge of the rates charged by the city therefor he by implication agrees to pay those rates, and his obligation to make payment rests upon contract, rather than upon an exercise by the state of the taxing power. * * *"

This decision was followed by that of the *City of Chicago v. Northwestern Mutual Life Insurance Company*, 218 Ill., pages 40 to 44, and the doctrine of the contractual relation was again mentioned.

On the theory that a contractual relation existed between the City of Chicago and a water consumer, the corporation counsel's office has heretofore and does now suggest that wherever possible the superintendent of water should endeavor to procure the signature of the water consumer to an application contract in all meter cases, for the reason that when the corporation counsel's office is called upon to prosecute a case for the recovery of money due the city for the delivery of water it finds itself without proper, legal and sufficient evidence to make out a case unless the signature of the consumer is on the application blank.

In order to obviate the above obstacle, we recommended to the superintendent of water that he have printed and dis-

tributed as soon as possible the above mentioned application contract form "B W—300," in order that the city may be in a position to prove who its water consumer is whenever required to do so in court. These application contracts should not be used in the case of water frontage assessments.

In regard to that portion of the contract designated as follows: "Meter to be protected," etc., we beg leave to state that we heretofore suggested and repeat that a statement of this kind in said contract is proper, because it calls upon the water consumer to take an interest in and to look after his own meter and in many cases relieves the city of embarrassment.

That portion of the contract requiring the vault to be constructed and maintained by the consumer, we hold is in conformity with Section 2776. The mere presence of the two provisions above mentioned, in the contract, in no way invalidates the contract.

We desire to say that on May 25th, an opinion was rendered by the writer on the above subjects, but for some reason or other, failed to reach the corporation counsel, and consequently failed to receive his signature. This opinion is a copy of the other with some slight changes.

Trusting our reply is satisfactory, we beg to remain

Yours very truly,

J. J. VITERNA,

Assistant Corporation Counsel.

Approved:

CHARLES M. HAFT,

Acting Corporation Counsel.

Storage of Cars by Elevated Railroad on the Elevated Structure.

July 10, 1915.

HON. HENRY D. CAPITAIN, Chairman, Committee on Local Transportation.

Dear Sir:

In your letter of July 2, 1915, you call our attention to the order introduced in the City Council on June 14, 1915,

by Alderman Littler, directing the Committee on Local Transportation "to take up for consideration the matter of having the Metropolitan Elevated Railroad Company remove their storage yard on their Humboldt Park Branch to a point west of Kedzie avenue." Your committee desires an opinion as to whether the Metropolitan Elevated Railroad Company has a right to store cars on its structure and whether such storage constitutes a public nuisance.

It is not contended that the cars are located upon or over any streets, alleys or public places in the city. The cars are stored upon the private property of the company.

This question has been treated in several opinions, all of which are referred to in your letter. This department has invariably held that the city is helpless to interfere when the storing of cars takes place on the private property of the company. The reason for this is that there are no provisions either in the franchise grants of the elevated companies or in the code which make the practice of storing cars on private property unlawful.

If the practice can at all be prohibited it will be necessary to pass a penal ordinance declaring such practice a nuisance and providing penalties therefor.

The 75th Clause of Section 1, Article V, Cities and Villages Act, empowers the city "to declare what shall be a nuisance, and to abate the same; and to impose fines upon parties who may create, continue or suffer nuisances to exist."

The power to declare a nuisance does not give the city the right to declare a thing a nuisance which is not a nuisance in fact and an ordinance declaring a thing a nuisance which is not so in fact is unreasonable and void.

Yates v. Milwaukee, 77 U. S. 497.

Laungel v. City of Bushnell, 96 Ill. App. 618; affirmed 197 Ill. 20.

Munsell v. City of Carthage, 105 Ill. App. 119; affirmed 203 Ill. 474.

North Chicago City Railway Co. v. Town of Lake View, 105 Ill. 207.

Village of Desplaines v. Poyer, 123 Ill. 348.

Mary Sings et al. v. City of Joliet, 237 Ill. 300.

In *Village of Desplaines v. Poyer, supra*, the court said, at page 351:

“The question when the thing may or may not be a nuisance must be settled as one of fact and not of law.”

If it can be shown that there is a direct connection between the storage of cars on private property and the health, comfort, safety or general welfare of the public, and that the health, comfort, safety or general welfare of the public would be improved by the enforcement of an ordinance prohibiting the storage of cars on private property, it is quite likely that the courts would sustain such an ordinance.

We do not believe, however, that such a showing can be made, and we are inclined to the opinion that the courts would declare such an ordinance an unwarranted and unjustified interference with the elevated company in the use of its private property, and therefore invalid.

Yours respectfully,

MAX M. KORSHAK,
Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,
Corporation Counsel.

Domestic Animals Affected with Rabies and Other Communicable Diseases.

July 10, 1915.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

We have your communication of the 3d inst., transmitting letter of the 29th ult., of the commissioner of health to your committee, relative to the case of a horse which became affected with rabies and which, previous to its destruction, bit the owner and six horses and one cow; the letter states that, “As a precautionary measure, these animals were all committed to the dog pound for observation and safety to the public. * * * The question which confronts this depart-

ment (health) now is regarding the destruction of the animals, which I consider advisable for safety." You ask the corporation counsel for an opinion regarding liability of the city for bearing expense of maintenance of the animals in question.

The state law of Illinois provides for attention to and the care of animals in cases of the character described in the letter of the commissioner of health, and the law, "An Act to revise the law in relation to the suppression and prevention of the spread of contagious and infectious diseases among domestic animals," approved June 14, 1909, in force July 1, 1909, makes it the duty of any person having knowledge of the existence of such diseases to immediately notify the Board of Live Stock Commissioners by communication to said board or a member thereof. The act provides the method of procedure to be followed by the state board, and for the quarantine of the diseased animals and such as have been exposed to contagion, and for their destruction, when the same shall be necessary, and compensation to the owners, etc. (See Section 48, *et seq.*, Chapter 8, Hurd's Revised Statutes of Illinois, 1913.)

We think that, pursuant to the state law, the commissioner of health should at once notify the Board of Live Stock Commissioners, regarding the matter, as provided in the statute.

Yours very truly,

GEORGE B. O'REILLY,

Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,

Corporation Counsel.

Compensation from Telegraph Companies on Account of Grants.

July 19, 1915.

HON. EUGENE R. PIKE, City Comptroller, Chicago.

Dear Sir:

In reply to your letter of May 24, 1915, in which you ask for an opinion as to the legal right of the city to claim

compensation on certain disputed percentages, which are evidenced by warrant for collection F-627 for \$3,334.77, and warrant F-628 for \$1,082.86, it is our opinion upon the facts contained in the letter of May 17, 1915, from F. J. McLain, Secretary of the Illinois District Telegraph Company and the accompanying letters attached, that the city has the legal right to claim compensation on the disputed percentages.

Warrant F-627 covers $2\frac{1}{2}$ per cent of the gross receipts of The Automatic Fire Protection Company from January 1, 1912, to June 13, 1913, which is claimed under an ordinance granted to The General Fire Alarm and Watch Service Company on April 20, 1903, Council Journal, page 8, which company was subsequently doing business as The Automatic Fire Protection Company, which ordinance is in part, as follows:

“Section 1. That permission and authority be and the same is hereby granted to the General Fire Alarm and Watch Service Company, a corporation of Illinois, its successors and assigns, to place, construct and maintain wires under and across the streets and alleys of the City of Chicago, together with such supply wires as may be found necessary for the sole purpose of conducting a watch signal service and automatic fire alarm system.
* * *

“Section 2. The rights and privileges herein granted shall cease and determine twenty (20) years from and after the date of the passage of this ordinance.

“Provided that the rights granted hereunder shall cease and determine unless within six months from and after the date of the passage of this ordinance said grantee shall have actually placed in operation, and shall thereafter maintain in operation, the watch signal service and automatic fire alarm system mentioned in this ordinance.

“Section 7. * * * During the first ten years of the life of this ordinance, and of the privileges hereby granted, the said company shall pay annually to the City of Chicago the sum of two and one-half per cent of its gross receipts. During the next five years of the life of this ordinance (or the third period of five years), said company shall pay annually to the City of Chicago five per cent of its gross receipts. During the last five years of the life of this ordinance (or the fourth period of five years), said company shall pay annually to the City of Chicago ten per cent of its gross receipts. The

payments hereunder shall be made on the second day of January of each year. * * *''

Section 7 provides for compensation to be paid to the city by said company in consideration of the franchise granted, which compensation is to be $2\frac{1}{2}$ per cent of the company's gross receipts for the first ten years for the business conducted under authority of said ordinance. Warrant F-627 is issued under said section.

It appears from letters you forwarded that the General Fire Alarm and Watch Service Company is a subsidiary of the Automatic Fire Protection Company, a Maine corporation, to whom the above ordinance was granted, and it has never really operated in the City of Chicago; that either the Illinois District Telegraph Company or the American District Telegraph Company operated under said franchise, by agreement with the Automatic Fire Protection Company, and collected all the rentals and remitted a portion thereof, to wit, approximately 45 per cent, to the Automatic Fire Protection Company.

The contention is that, as the telegraph companies now pay compensation on their 55 per cent of the gross receipts of the Automatic Fire Protection Company under their franchises, the Automatic Fire Protection Company should be relieved from its obligation to make payment upon that much of its gross receipts.

This company is bound, under Section 2 of its ordinance, to operate and maintain in operation, its wires, so that it may properly exercise the functions and perform the obligations and duties required of it by its franchise. Without the wires the Automatic Fire Protection Company would be utterly unable to transact its business. The fact that the company carries on its business through another company or companies who pay on their gross receipts does not relieve it from its obligation to pay as provided by ordinance. The city is not concerned with any private agreements between the company and the telegraph companies. The company has no right whatever to transact business in the streets excepting as that right is granted by the city, and the city has seen fit to give

that right upon the condition that the company pay a certain percentage of its gross receipts.

In *The York and Maryland Line Railroad Company v. Winans*, 58 U. S. Rep. 30, the court says on page 39:

“The plaintiff complains here of this charge, for that the cars employed were not built by, and did not belong to the company; that they were the exclusive property of the Maryland corporation; and that the agreement to divide the profits did not constitute a partnership, nor evince a relation of principal or agent to impose a liability. This conclusion implies, that the duties imposed upon the plaintiff by the charter, are fulfilled by the construction of the road, and that by alienating its right to use, and its power of control and supervision, it may avoid further responsibility. But those acts involve an overturn of the relations which the charter has arranged between the corporation and the community. Important franchises were conferred upon the corporation to enable it to provide the facilities to communication and intercourse, required for the public convenience. Corporate management and control over these were prescribed, and corporate responsibility for their insufficiency provided, as a remuneration to the community for their grant. The corporation cannot absolve itself from the performance of its obligations, without the consent of the Legislature.”

This department has given an opinion on this very question through William D. Barge, former assistant corporation counsel, to John E. Traeger, under date of March 19, 1908, and we are still of the same opinion.

Warrant F-628, as we understand it, covers an amount that is due the city on gross receipts from June 14, 1913, to December 31, 1914, being 5 per cent of \$21,657.31, gross receipts, that the Illinois District Telegraph Company omitted from statements.

The ordinance of the Illinois District Telegraph Company, passed March 26, 1906 (Council Journal, page 3082), is in part, as follows:

“Section 1. That permission and authority be and they are hereby granted to the Illinois District Telegraph Company, a corporation organized and existing under the laws of the State of Illinois, to install, construct, maintain and operate a line or lines of electric

wires for the transmission of signals for the purpose of carrying on its burglar alarm, fire alarm, sprinkler alarm and watch service systems. The said line or lines of wires shall be installed, repaired and operated in existing conduits, subways and tunnels under any public street, alley and the Chicago river and its several branches;
* * *

"Section 2. The permission and authority herein granted shall cease and determine ten (10) years from and after the passage of this ordinance; provided, however, that this ordinance shall be subject to amendment or repeal at any time prior thereto.

"Section 7. The rights herein granted are upon the express condition that said grantee, as compensation for the privileges conferred by this ordinance, will on or before the tenth (10th) day of January of each year during the life of this ordinance, pay into the treasury of the City of Chicago five per cent (5 per cent) of its gross receipts derived from the transaction of said burglar alarm, fire alarm, sprinkler alarm and watch service business within the city for the year ending with and including the thirty-first (31) day of December of the previous year, and at the time of making the said payment file with the city clerk a statement in writing of the said gross receipts for the said previous year ending as aforesaid."

The Illinois District Telegraph Company is authorized under Section 1, above set out, to install, construct, maintain and operate a line or lines of electric wires for the transmission of signals for carrying on, among other things, a sprinkler alarm and watch service system. The contention of the Illinois District Telegraph Company is that it is acting as agent for the General Fire Extinguisher Company for part of the money which the Illinois District Telegraph Company collects for rentals, under contracts made by them with the subscriber for supervisory service on sprinkler equipment already installed by the General Fire Extinguisher Company. A proportion of the rental secured under said contracts turned over to the General Fire Extinguisher Company is in consideration of the uses of certain of their patented devices, a part of these devices at least being installed by the General Fire Extinguisher Company at the time the sprinkler sys-

tem is constructed, notwithstanding that a contract for supervisory service may never be secured by the Illinois District Telegraph Company and the portion turned over to the General Fire Extinguisher Company constitutes no part of their gross receipts.

We cannot agree with this contention. It is our opinion that, as the Illinois District Telegraph Company makes the contract with the subscriber to furnish the supervisory service, the entire proceeds of these contracts constitute the gross receipts of the Illinois District Telegraph Company. If any part of the rental secured by these contracts is turned over to the General Fire Extinguisher Company, it is turned over to them in consideration of the use of certain of their patented devices, and is a payment of the Illinois District Telegraph Company of a necessary expense, and the total thereof should be included in the gross receipts of the Illinois District Telegraph Company.

Section 7 above set out provides for the compensation to be paid to the city by said company in consideration of the franchise granted, which compensation is to be five per cent of the company's gross receipts, and warrant F-628 is undoubtedly issued under the above section.

We are, therefore, of the opinion that, while the amounts paid to the General Fire Extinguisher Company are paid out of such gross receipts, nevertheless, compensation should be paid to the City of Chicago by the Illinois District Telegraph Company, out of the amounts received, before any deductions are made therefrom.

Yours respectfully,

LEON EDELMAN,
Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,
Corporation Counsel.

Mechanics Lien Claim Against City Contractor.

July 10, 1915.

HON. CHARLES H. SERGEL, City Treasurer, Chicago.

Dear Sir:

We acknowledge receipt of your communication to this office dated June 23, 1915, requesting an opinion as to the legal effect of a mechanic's lien notice served by Robert H. J. McCandless.

Said notice is as follows:

"Chicago, Ill.,
June 21, 1915.

City Treasurer, City of Chicago.

Dear Sir:

Albert Graff and Company having contract for cement walks known as Warrant No. 42204, on Lot 171 McGuire & Orr's Ridge Blvd. Addition. Said contractors having trespassed on my lot and used my sand and gravel for said walk and filling purposes. I have notified commissioner of public works not to issue order for payment on said contract and I hereby notify you not to pay any order on said contract until such time as said contractor has settled with me for damages.

Yours sincerely,

ROBERT H. J. McCANDLESS.

7345 Clayton Ct., Chicago."

The law applicable to the above matter is as follows:

"7161. §23. Lien against fund due or to become due—Contractors for public improvements, notice—Duty and liability of officer notified.) Any person who shall furnish material, apparatus, fixtures, machinery, or labor to any contractor for a public improvement in this State, shall have a lien on the money, bonds or warrants due or to become due such contractor for such improvement: Provided, such person shall, before payment or delivery thereof is made to such contractor, notify the officials of the State, county, township, city or municipality whose duty it is to pay such contractor of his claim by a written notice. It shall be the duty of such official so notified to withhold a sufficient amount to pay such claim until it is admitted, or by law established, and thereupon to pay the amount thereof to such person, and such payment shall be a credit on the contract price to

be paid such contractor.* Any officer violating the duty hereby imposed upon him shall be liable on his official bond to the person serving such notice for the damages resulting from such violation which may be recovered in an action at law in any court of competent jurisdiction. There shall be no preference between the persons serving such notice, but all shall be paid *pro rata* in proportion to the amount due under their respective contracts.”

(Section 23, Mechanics’ Lien Act, Chapter 82, Paragraph 7161, Jones & Addington Illinois Statutes Annotated.)

The above section has been upheld as a constitutional enactment in the cases of *West Chicago Park Commissioners v. Western Granite Company*, 200 Ill. 527; *National Bank of LaCrosse v. Petterson*, 200 Ill. 215; and also in *Haynes & Lyons v. County of Coles*, 234 Ill. 137.

Therefore, we are of the opinion that, upon the serving upon or filing of the above described notice with you as city treasurer, said McCandless, if his representations are true, may, under the above quoted section of the Mechanics’ Lien Act, be entitled to all the rights of a sub-contractor for the furnishing of material upon a public improvement, and we are of the opinion that you will be justified in order to protect the interests of the city to withhold from the contractor any money, bonds or warrants due him, to the extent of the amount of the claim of Mr. McCandless, until such time as the same is settled either amicably or in a court of law by and between the contending parties.

We herewith return to your office the above referred to notice, and we are also sending a copy of this opinion to the Board of Local Improvements, in order that they may be informed of this development of the matter.

Respectfully,

M. W. CAGNEY,

Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,

Corporation Counsel.

Pension Rights of Children of Insane Policeman After His Death.

July 13, 1915.

TO THE BOARD OF TRUSTEES OF THE POLICEMEN'S PENSION
FUND.

Gentlemen :

You referred to me the application for pension of H. Durward Ludlow, guardian of Loretta Scanlon, John Scanlon and Agnes Scanlon, minor children of William J. Scanlon and Elizabeth Scanlon, both deceased.

William J. Scanlon was appointed a police patrolman on July 1, 1892, and served as a member of the police force until he was legally adjudged insane July 16, 1908. On April 7, 1909, William J. Scanlon applied for a pension, which was ordered to be paid to his wife, Elizabeth Scanlon, pursuant to the provisions of Section 6 of the Police Pension Act.

Elizabeth Scanlon continued to draw the pension allowed by the Board of Trustees during the lifetime of William J. Scanlon, and thereafter until her death, which occurred May 9, 1915. It appears that Wm. J. Scanlon died on June 25, 1914.

I am informed that no notice of the death of Wm. J. Scanlon was communicated either to the board of trustees or to its clerk and secretary, until after the death of Elizabeth Scanlon.

The question which arises in this case is whether the pension provided for in Section 6, in a case wherein a policeman is legally adjudged insane after ten years of service, continues after the death of the insane policeman, or whether it ceases in such event.

Said Section 6 of the Police Pension Act is in part as follows:

“* * * Whenever any policeman shall, after ten years' service and while still in the service of such city, village or town, be legally adjudged insane and at such time shall have a wife or child or children under the age of sixteen years, said board shall order and direct that

a pension of one-half the salary, not exceeding the sum of nine hundred dollars, shall be paid to such wife, or if there be no wife, then to such child or children, until they shall be sixteen years of age: Provided, however, that if at any time it be declared in the manner provided by law that such person is restored to reason, then such pension shall cease, and such person shall, in the discretion of said board, be reinstated in the department in the rank held by him at the time he was legally adjudged to be insane: Provided, further, that such pension shall cease if such person shall leave or be taken outside of the State of Illinois. * * *

It will be seen from the foregoing that no express provision is made for the disposition of the pension upon the death of the insane person.

In other instances for the allowance of pensions, such as after 20 years of service, or upon disability in the performance of duty, there is provision for the continuation of the pension allowed to the deceased, in favor of the wife or child or children of the deceased. (See Sections 3 and 4 of the Police Pension Act, as amended by an act approved June 13, 1913, Hurd's Revised Statutes, 1913, 379, 380.)

In the case of a policeman who is adjudged insane, the pension does not, however, in the first instance, run in favor of the insane policeman, but as in the case of death in the performance of duty, the pension is allowed by law to the wife of the insane person, who corresponds to the widow of the deceased. Indeed, both classes of cases, *i. e.*, those arising in the event of death in the performance of duty or death resulting from injuries received in the performance of duty, and those arising in the event of the insanity of the policeman after ten years of service, are treated together in the same section of the Pension Act, Section 6, and in my opinion, the disposition of the allowance to the wife of an insane policeman, upon the death of such policeman, was either inadvertently omitted, or considered by the legislature as unnecessary in view of the language of the entire act.

I cannot perceive any distinction between the widow of a deceased pensioner and the widow of an insane policeman, who, before the death of such policeman, was allowed a pen-

sion as his wife. There is no reason why, in the former case, the widow should be allowed to draw the pension so allowed, and in the latter case, the pension should cease and determine.

There is nothing in the section above quoted which expressly provides for terminating the allowance upon the death of the person adjudged to be insane.

From a reading of the entire act, it is my opinion that the language of Section 6, hereinabove referred to, may be given a construction which will allow the widow or the minor children of the deceased person who had been adjudged insane, to continue to enjoy the benefits of the pension.

In view of the foregoing, I recommend that the application of H. Durward Ludlow, as guardian of the estate of Loretta Scanlon, John Scanlon and Agnes Scanlon be allowed, and that the pension be ordered to be paid to the guardian until the children referred to attain the age of sixteen years.

Respectfully submitted,

JOSEPH F. GROSSMAN,

Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,

Corporation Counsel.

Redistricting of City into Wards.

July 13, 1915.

HON. OTTO KERNER, Chairman Judiciary Committee.

Dear Sir:

Replying to your inquiry concerning power of the City Council to redistrict the city into wards at this time, we advise you that this subject is controlled by Section 2 of Article III of the Cities and Villages Act and Section 4 of Article IV of the same act. The section first referred to provides, in part:

“And if any such annexed territory has less than 15,000 inhabitants, and less than three square miles in extent, then the City Council shall annex it to any ward

or wards which it adjoins: *Provided, further*, that when the number of aldermen in any such city shall reach seventy by reason of such annexed territory, the City Council shall redistrict said city into thirty-five new wards, and no more; and when said number of aldermen shall reach seventy, if any new territory is thereafter annexed which shall contain 25,000 inhabitants, or more, as determined by the last preceding national, State, school or other census authorized by law to be taken, then said City Council shall redistrict said city into thirty-five wards * * *."

Section 4 of Article IV, above referred to, provides:

"The City Council of any city in this State, whether organized under this act or under any special law of this State, may, from time to time, divide the city into one-half as many wards as the total number of aldermen to which the city is entitled; and one alderman shall, annually, be elected in and for each ward, to hold his office for two years, and until his successor is elected and qualified. In the formation of wards the population of each shall be as nearly equal, and the ward shall be of as compact and contiguous territory, as practicable."

It would seem from an examination of these two sections that, under the terms of the section first quoted, redistricting is obligatory under the circumstances therein enumerated, and that, under the section last quoted, redistricting is optional with the council at any time that in its judgment occasion requires such action.

Authority for this conclusion is to be found in *People v. City of Danville*, 147 Ill. 127, wherein the court, at pages 134, 135 and 136, says:

"The question presented by counsel in their briefs is as to the validity of the ordinance of March 19, 1892. The contention on the part of the relator is, that under the provisions of the statute in that behalf, a city having a population of over 10,000, and not exceeding 30,000, is entitled to elect fourteen aldermen, and to be divided into seven wards, but that when the city council of such city has once divided it into seven wards, its power in that behalf is exhausted, and that it has no authority to re-district the city, so as to change the boundaries of the wards, until its population reaches 30,000. It is therefore

urged that the city council, having passed the ordinance of February 6, 1890, dividing the city into seven wards, could not again re-district it, and that the ordinance of March 19, 1892, is void.

Section 2, Article 3, of the Act of 1872, in relation to the incorporation of cities and villages, as amended by Act of June 4, 1889, provides as follows:

‘The number of aldermen, when not elected by the minority representation plan, shall be as follows: In cities not exceeding 3,000 inhabitants, six aldermen; exceeding 3,000, but not exceeding 5,000, eight aldermen; exceeding 5,000 and not exceeding 10,000, ten aldermen; exceeding 10,000 and not exceeding 30,000, fourteen aldermen; and two additional aldermen for every 20,000 inhabitants over 30,000.’

Then follows a proviso in relation to cities of over 350,000 inhabitants, which, so far as we can see, can have no bearing upon any question arising in this case, after which is the following proviso:

‘And provided, further, if it shall appear from any census heretofore or hereafter taken, that any city has the requisite number of inhabitants to authorize it to increase the number of aldermen, it shall be the duty of the city council thereof to proceed without delay and re-district such city in accordance with the provisions hereof, and to call and hold its next city election in accordance with such new re-districting: *Provided*, that at such election, the aldermen who hold over shall be considered aldermen for the new wards respectively in which their residence shall be, unless there shall be two or more aldermen who hold over in the same ward under this proviso, then, in such case, it shall be determined by lot in presence of the city council, in such manner as they shall direct, which alderman shall hold over for such ward.’ 3 Starr & Cur. Stat. 179.

Section 4, Article 4, as amended by Act of June 17, 1887, is as follows:

‘The city council of any city in this State, whether organized under this act or under any special law of this State, may, from time to time, divide the city into one-half as many wards as the total number of aldermen to which the city is entitled; and one alderman shall annually be elected in and for each ward, to hold his office for two years, or until his successor is elected and qualified. In the formation of wards, the population of each shall be as nearly equal and the ward shall be of as com-

pact and contiguous territory as practicable.' 3 Starr & Cur. Stat. 180.

We are referred to no other statute bearing upon the question before us, and we are aware of none. Our decision then must depend upon the construction to be placed upon these legislative provisions, and especially upon the language of Section 4, of Article 4. That section would seem to vest in city councils a discretion to redistrict their cities into an appropriate number of wards, whenever, in their opinion, there is suitable occasion for so doing. They are authorized, not once for all, but 'from time to time,' to divide their cities into the number of wards to which they are entitled. This interpretation of the language used is so obvious that it must prevail, unless some cogent reason to the contrary is shown."

Our conclusion, therefore, is that plenary authority is vested in the city council to redistrict the city into thirty-five wards if in its discretion the facts warrant so doing.

Yours very truly,

CHARLES M. HAFT,

First Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,

Corporation Counsel.

Payment of Extras on Contracts.

July 15, 1915.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

Replying to the request of your committee for an opinion and recommendation relative to the John J. Brittain Co. claim, we advise you that there are several insuperable barriers to the allowance of this claim. One of these is to be found in The Chicago Code of 1911, Section 2102, which provides:

"2102. CONTRACT—EXTRA WORK.) Where any work or job is done or is being done for the city under contract, no payment shall be made on such contract for

any work not specified in such contract, and no money shall be paid beyond the prices specified in such contract for any work, labor or material necessary for, or used in, completing the work provided for by such contract.

“Where any contract is entered into on behalf of the city with any person, firm or corporation for the doing of any work or job, no extra work upon the undertaking or job authorized in such contract shall be ordered or authorized to be done by the commissioner of public works, or by any officer or agent of the city, which will involve the expenditure of any money over and above the amount specified and fixed as the contract price in and by such contract, unless the express authority of the city council be first procured for such extra work and for the expenditure of the amount to be paid therefor.

“In any case where work is done under contract with the city under the supervision of the commissioner of public works and it shall be the opinion of the said commissioner that in order to properly complete such work, extra work not provided for in such contract will have to be done, or additional expenditures not provided for in such contract will have to be made, said commissioner shall submit a report in writing to the city council, setting forth fully what extra work is desired, the necessity therefor and the amount of money necessary to be expended in and about such extra work.”

This provision, in our judgment, would in itself constitute a sufficient legal barrier to preclude the payment to the Brittain Co. of the claim before your committee, in so far as any amount in excess of the aggregate sum of \$55,000 is concerned, about \$19,000 of which, we understand, has already been paid, and the balance of which \$35,000 we understand has been ordered to be paid.

Another legal barrier to the allowance of the claim in question in excess of the \$35,000 hereinbefore referred to is paragraph 116a of Chapter 24, Article IX, Hurd's Revised Statutes, 1913, which provides, in part:

“Any work or other public improvement, except any work or public improvement to be paid for in whole or in part by a special assessment shall when the expense thereof shall exceed \$500, either be constructed by contract let to the lowest responsible bidder in the manner prescribed by ordinance: (*Provided, however, any such*

contract may be entered into by the proper officers without advertising for bids, by a vote of two-thirds of all the aldermen or trustees elected) * * *.”

It will be readily observed that the purpose of this section of the statute is to protect the taxpayers of a municipality by requiring competitive bidding on all contracts involving an expenditure in excess of \$500, unless the aldermen or trustees, as the case may be, see fit to take upon their shoulders the responsibility of awarding the contract without advertising for bids, in which case a two-thirds vote is necessary. If the contractor were to go ahead on his own initiative, or any department head were to be permitted to authorize the contractor to do work not covered by his contract, the taxpayer would be deprived of his alternate protection of competitive bids on the one hand, or a two-thirds vote of the city council on the other hand.

That, where a contractor performs work for a municipality in violation of these provisions of the statute, he is not entitled to recover the fair market value of the work so performed, is no longer an open question in this State.

J. E. Roemheld v. City, 231 Ill. 467.

Rogne v. People, 224 Ill. 449.

Either one of the objections which we have heretofore raised to the claim in question, in excess of \$35,000, is in itself sufficient to require that the claim be disallowed.

It might possibly be contended that where a contract is once let—as the one in question was—and the letting is in the manner prescribed by statute, changes may thereafter be made without again complying with the statute. This contention has been considered and determined adversely by the contention in *Pells v. City of Paxton*, 176 Ill. 318.

In view of the foregoing, we feel compelled to recommend that the claim of John J. Brittain Co. for any amount in excess of \$35,000 be disallowed.

Yours truly,

JOHN H. PASSMORE,

Assistant Corporation Counsel.

Approved:

CHARLES W. HAFT,

First Assistant Corporation Counsel.

Status of Certain Machines Seized as Gambling Devices.

July 15, 1915.

HON. C. C. HEALEY, General Superintendent of Police.

Dear Sir :

We are in receipt of your letter of recent date to which was attached copy of a letter from the prosecuting attorney, in which he suggests that an opinion be obtained from the corporation counsel concerning certain machines that have been seized as gambling devices.

We do not understand that you call for an opinion as to whether any specific case of the operation of this machine or any customary method of operating it is gambling. In other words, we do not want to be understood as saying that gambling cannot be carried on with such a machine, even though we may hold, as we do, that it is not a gambling device.

The writer examined several of the machines and found that they are in appearance and general design about the same as the ordinary slot-machine used for gambling; that they contain packages of gum, which are delivered whenever an indicator, which is on the front of same, states that the purchaser will receive gum. When the machine is operated, at irregular intervals, in place of the word "gum" appearing on the indicator, a figure is shown which may be 2, 4, 6, 8 or any other number; and when the figure is shown, in case a coin is dropped into the slot, trade checks come out in accordance with the number shown on the indicator. It will thus be seen that any person who drops coins in the slot is able to ascertain beforehand what he will receive by simply looking at the indicator. If he drops only one coin, the transaction cannot be looked upon as a gambling operation, since it is a simple purchase and sale, the purchaser knowing exactly what he is to receive.

This department has had occasion many times to define gambling and to pass on devices used for gambling. We therefore deem it unnecessary to enter into a discussion of what is gambling or cite any authorities to support our views. The gist of all opinions rendered on this subject is that there must be three elements in order to constitute a gambling operation; there must be a consideration, a prize and a chance. If any one of these three elements is lacking there is no gambling. In operating the machine in question the element of chance is entirely lacking, consequently it cannot be construed as a gambling device.

As stated above, however, it does not follow that the machine cannot be used for gambling purposes, and when so used the parties may be prosecuted, as in the case of all other gambling. In other words, if it can be shown that the machine is being used for the purpose of luring on persons to take the chance of obtaining the trading checks on a succession of plays the person who does so is really gambling, and then the device will be regarded as a gambling device just the same as all other tools and implements for purposes of gambling.

In order to make ourselves perfectly clear on this point we will illustrate as follows: An ordinary table is not a gambling device. It may become a gambling device if it is installed in a place where gambling is carried on and used for the purpose of dealing cards or shaking dice or in connection with any other tools, implements or appliances ordinarily connected with games of chance. In the present instance the machines cannot be confiscated as gambling devices until there is something shown to the effect that they are actually used as gambling devices. We have not the right to assume that persons will deliberately gamble simply because there is a possibility of gambling with the machine, any more than we have the right to assume that matches will be used in the place of poker chips.

Our conclusion, therefore, is that the machine cannot be confiscated as a gambling device except in cases where there is other evidence to prove that it is being used for gambling

purposes, in which event the same rule applies to this machine as to any other appliance that is used for gambling.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

CHARLES M. HAFT,

Acting Corporation Counsel.

**Liability of City for Damage on Account of Sparks from
Fire Engine.**

July 19, 1915.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

In compliance with yours of June 8th, transmitting council order and statement with affidavit in the claim of Lindsay Storage Company for compensation for damage caused by sparks from a City of Chicago fire engine, and requesting an investigation of and opinion in the matter, we reply as follows:

We have not deemed it necessary to have an investigation made, as the question presented in this matter is settled by authority as fully and conclusively as any can ever be said to have been. The precise question has not been decided by the courts in this state, but in *Hayes v. Oshkosh*, 33 Wis. 314, this very question has been passed on, and the court, at page 318, said:

“The grounds of exemption from liability, as stated in the authorities last named, are, that the corporation is engaged in the performance of a public service, in which it has no particular interest, and from which it derives no special benefit or advantage in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by law for the general welfare of the inhabitants, or of the community; that the members of the fire department, although appointed by the city corporation, are not, when acting in the discharge of their duties, servants or agents in the employment of the city, for whose conduct the city can be held liable; but they act

rather as public officers, or officers of the city charged with a public service, for whose negligence or misconduct in the discharge of official duty no action will lie against the city, unless expressly given; and hence the maxim *respondeat superior* has no application."

And the governing principle enunciated in the above case has been repeatedly recognized by our courts in the following:

Wilcox v. City of Chicago, 107 Ill. 334.

Tollefson v. Ottawa, 228 Ill. 134.

Chicago v. Selz, 202 Ill. 545.

Chicago v. Williams, 182 Ill. 138.

We are, therefore, of the opinion that the City of Chicago is not liable for the damages caused by the sparks from the fire engine.

We herewith return council order and statement with affidavit.

Yours truly,

LEON EDELMAN,
Assistant Corporation Counsel.

Approved:

CHARLES M. HAFT,
Acting Corporation Counsel.

Prize Package as Incentive to Gambling.

July 20, 1915.

HON. C. C. HEALEY, General Superintendent of Police.

Dear Sir:

You forwarded to us for our inspection a prize package, labeled "Chums," a product of Rueckheim Bros. & Eckstein, with the request for an opinion as to whether or not the sale of same is in violation of law.

The package consists of sugared or flavored pop corn, and on the inside there is a small toy. The one sent to us contained a clapper. In order to ascertain whether there was any difference in value in the toys used, we asked the manufacturers to submit a list to us, which they did. The list

contains about forty-five different articles, such as Japanese fans, butterfly pins, tops, whistles, etc. We are informed that the value of these toys runs from one-fourth cent to one-half cent, the average being about thirty-five cents per hundred. We are further informed by the manufacturers that it is their aim to keep the value of same as nearly even as they can.

Under these circumstances, it does not seem as though they are putting up a package which can be regarded as a lottery or chance scheme. It is true, the children buying these packages will experience some interest and perhaps surprise in opening them up, but it cannot be said that they constitute an incentive to gambling, since the value of all the different packages is practically the same. It would be drawing very finespun distinctions if differences in value should be discovered in them. Hence, even though the package is called a prize package, we do not consider its sale and distribution contrary to law.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

CHARLES M. HAFT,

Acting Corporation Counsel.

River Docking Privileges.

July 21, 1915.

HON. WILLIAM HALE THOMPSON, Mayor.

Dear Sir:

In answer to the communication of Frost Brothers, of the 11th inst., which is herewith returned, I wish to say that the docking of steamers along the south side of the river has led to complaints in the past by property owners or their tenants—such parties sometimes objecting to the action of the city in granting such permission for the shipping season upon the payment of compensation.

As a rule, these objections were based upon the assump-

tion that all riparian rights belonged to the owners of property along the river, and that the city exceeded its powers in granting such privileges to steamship companies without their consent.

Frost Brothers complain that the steamer United States lying there every night until ten o'clock in the forenoon cuts off the air and light of the tenants located on the river side of South Water street between Clark and Dearborn streets.

While it is no doubt true that the docking of steamers does cause temporary inconvenience and annoyance to tenants along the river, it is equally true that the Chicago River is a great public highway and forms part of the harbor, over which and its shipping the city exercises jurisdiction.

Under the charter the city has power—

“To regulate and control the use of public and private landing places, wharves, docks and levees.

“To control and regulate the anchorage, moorage and landing of all water craft and their cargoes within the jurisdiction of the corporation.

“To collect wharfage and dockage from all boats
* * * landing at or using any public landing place, wharf, dock or levee within the limits of the corporation, etc.”

The simple question involved here is: Does the five-foot strip along the river in the block in question, constitute a public landing place, dock or wharf?

By the act of the General Assembly approved February 27, 1847, the City of Chicago was authorized to settle the title to wharfing privileges, which were claimed on both sides of the river between State and Madison streets.

Pursuant to the authority thus conferred, the common council, on February 11, 1848, passed an ordinance vacating part of Water street on the south side of the river, which ordinance was based among other propositions upon the following:

“Five feet on the river front of the public landings herein proposed to be transferred shall be and forever remain an open wharf, for the free use of persons passing on foot. Passengers by water shall in no case be charged wharfage or be subject to any charge whatever

for landing their ordinary traveling baggage upon said wharf."

From this it is evident that the fee of the land fronting on the river at the point in question is burdened with an easement in the public permitting the free use of the wharf and landing.

While the city cannot deprive the owners of their riparian rights by granting exclusive privileges to individuals to use the landing and wharf, the property owners cannot, on their part, deprive the public of the rights granted by the ordinance in question.

These public rights come under the jurisdiction of the city, which has for years granted permission to the Indiana Transportation Company to land and dock at the south side of the river between Clark and Dearborn streets, upon a stated compensation for the shipping season.

Respectfully submitted,

NICHOLAS MICHELS,

Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,

Corporation Counsel.

Revocation of Licenses of Architects.

July 21, 1915.

HON. CHARLES BOSTROM, Commissioner of Buildings.

Dear Sir:

In your letter of July 14, 1915, addressed to this department, you ask to be advised as to the effect of the revocation of the licenses of two certain architects by the State Board of Architects.

According to your letter, the State Board of Architects revoked the licenses of two architects on July 1, 1915. Your department received notice on July 7, 1915, with instructions not to issue permits or approve plans bearing the license seals of the architects whose licenses have been revoked.

From your letter it also appears that at the time the notice of revocation was received by you there were plans in your department signed and sealed by the architects in question, which were being checked by the engineers and which had already been approved by the Sanitary Bureau of the Health Department. Many of these plans were prepared fully a month prior to the revocation of the licenses and were paid for by the persons who had them designed. Furthermore, a number of plans have been received since the date of the revocation of the licenses bearing the seals of the architects in question.

You also state that your department has been advised by the State Board of Architects not to issue permits on plans coming from these architects, whether designed before the revocation of the licenses or after, and you desire to be advised whether or not this ruling of the State Board of Architects is in compliance with the ordinances and statutes applicable to this subject.

For the purpose of this opinion, we assume that the licenses of the architects were revoked by the State Board of Architects pursuant to the statutes relating to this subject, and that the architects have no right to practice their profession after the date of said revocation.

Section 231 of The Chicago Code of 1911 provides in part as follows:

“Each set of plans presented shall be approved by the commissioner of buildings before a permit will be granted. No permit shall be granted or plans approved unless such plans are signed and sealed by a licensed architect, as provided in ‘An Act to provide for the licensing of architects and regulating the practice of architecture as a profession in the State of Illinois,’ approved June 3, 1897.”

The above ordinance is open to two constructions—one construction is, that the persons signing and sealing the plans must be licensed architects *at the time that permits are granted or such plans are approved by your department*. The other construction is, that it is immaterial whether the person signing and sealing the plans is a licensed architect at the time

of the granting of such permit or the approval of said plans. Under this last construction the only question to be considered by your department is, whether the plans bear the signature and seal of a licensed architect.

The above ordinance was enacted in the interest of the public safety. The intention of the City Council evidently was to have plans prepared by those who are competent and qualified to do this work. For this reason, the council provided that plans shall be signed and sealed by licensed architects as provided by the statute referred to in the ordinance. As long as the plans bear the signatures and seals of licensed architects, it seems to us that it is immaterial whether the persons signing and sealing such plans are architects at the time permits and approval of said plans are requested from your department.

The only question for your department to consider is, whether the plans bear the signatures and seals of licensed architects who were authorized to practice architecture at the time such signatures and seals were affixed to said plans. If you find that such signatures and seals were affixed by the architects at a time when they were licensed to practice under the statutes of this state, then you have a right to consider such plans, notwithstanding the fact that the architects were deprived of the right to practice architecture after the signing and sealing of said plans. Any other construction would make the revocation of the licenses of the architects in question operate retroactively and would deprive them of the benefit of their work while they were licensed to practice their profession. This would also be an injustice to the owners of the buildings who employed the architects and who are entitled to the benefit of the work of said architects, which work was done when there was no question of the architects' right to practice their profession.

We are of the opinion, therefore, by reason of the foregoing, that the revocation of the licenses of the two architects referred to in your letter does not affect plans which have been signed and sealed prior to the revocation of said licenses. If you find that the plans now on file in your department or filed with you after the revocation of the licenses and re-

turned by you as stated in your letter were in fact signed and sealed by the architects prior to the time of such revocations, then such plans are in compliance with Section 231 aforesaid, and may be properly considered by your department.

Very truly yours,

MAX M. KORSHAK,
Assistant Corporation Counsel.

Approved:

CHARLES M. HAFT,
Acting Corporation Counsel.

**Status of Dealers in Bitters as Wholesale Spirituous
Liquor Dealers.**

July 22, 1915.

HON. CHARLES C. HEALEY, General Superintendent of Police.

Dear Sir:

Your letter of the 19th inst. requesting an opinion as to whether the Lasso Bitters Company, 2228 Milwaukee avenue, should be compelled to take out a wholesale spirituous liquor dealer's license has been handed the undersigned for reply.

The Bitters Company contends that the bitters sold by it is purely a laxative medicinal preparation composed of 21 per cent alcohol by volume, together with roots and herbs and nothing more, and for that reason the said company should not be required to take out a wholesaler's license for the sale thereof.

The company further states that the United States Government does not require a wholesale spirituous liquor dealer's license because the preparation is for purely medicinal purposes.

The question as to whether or not a certain liquor is or is not used for medicinal purposes is a debatable one depending largely upon whether the same can be used as a beverage or a medicine. There are many opinions of our courts with reference to these matters, holding preparations of this kind both medicines and intoxicating liquors. One of our United

States Courts in treating upon this question makes the following statement:

“One of the most common of the fraudulent devices to sell liquor ‘is to put a few drugs, barks or extracts into very common liquor and put it on the market for sale as a pretended medicine under the name of “Cordial,” “Tonic,” or “Bitters,” “Hostetter’s Bitters,” “Fitzpatrick’s Bitters,” “Mome Bitters,” “Home Sanative Cordial,” “Reed’s Gilt-Edge Tonic,” and other compounds were of this character, and have all rightly been adjudged to be mere shams as medicines, because they were sold and used as intoxicating beverages and for the liquor, and not for the drugs and barks they contained, and dealers in them have been dealt with precisely as if they had sold plain whisky without any disguise.’ *United States v. Stafford*, (U. S.) 20 Fed. 720, 722.”

The test to be used in determining whether or not a certain preparation may be classed as spirituous liquor seems to be laid down by our courts as follows:

“A compound which is distinctively known and used as a drug, medicine, or toilet preparation, and which cannot practically be taken as a beverage, for the sake of the alcohol which it contains, because of its repulsive taste or smell, because the effect of the alcohol is counteracted by the other ingredients, or because of its systematic effects if taken in excessive doses, is not within the statutes relating to intoxicating liquors, no matter how large a proportion of alcohol it may contain; and on the other hand, a medicinal preparation which is capable of being used as a beverage, and which contains such a percentage of alcohol that it will produce intoxication if drunk to excess, is within the meaning of such statutes, although it may contain other constituents which, either separately or in conjunction with alcohol, possess useful medicinal properties.” (23 Cyc. 58.)

With reference to the question as to whether bitters shall be considered intoxicating liquor, it is stated as a rule of law as follows:

“The various infusions called ‘bitters,’ containing alcohol together with bitter herbs, barks, or other medicinal ingredients, are subject to the laws regulating the sale of intoxicating liquors, if, notwithstanding the presence of the medicinal ingredients, they are capable of

being used as beverages and contain sufficient alcohol to produce intoxication when so used; but not if they are incapable of being used as drinks and where the alcohol is merely a necessary preservative or vehicle for the other constituents." (23 Cyc. 58.)

In most of the authorities that I can find, bitters have been considered both intoxicating liquors and spirituous liquors.

Prinzel v. State, 35 Tex. Crim. Reps. 274.

Carl v. State, 89 Ala. 93.

Carl v. State, 87 Ala. 17.

Commonwealth v. Pease, 110 Mass. 412.

Commonwealth v. Leo, 110 Mass. 414.

State v. Lillard, 78 Mo. 136.

James v. State, 21 Tex. Cr. App. 353.

If the article may be used as an intoxicating beverage it is a violation of the statute to sell it. (See Woollen & Thornton on Intoxicating Liquors, Vol. 1, Sec. 573, and cases there cited.) This has been held to apply to medical preparations that will produce intoxication.

Chapman v. State, 100 Ga. 311.

State v. Gray, 61 Conn. 39.

State v. Bennet, 3 Har. (Del.) 565.

The fact that the United States Revenue Laws require no license for the sale or manufacture of these bitters is no defense to a violation of the state law.

State v. Lillard, 78 Mo. 136.

State v. Wilson, 80 Mo. 303.

State v. Delano, 54 Me. 501.

Since the object of enacting an ordinance compelling wholesale spirituous liquor dealers to take out a license is for the purpose of regulating the sale of intoxicating liquors, and for the purpose of extirpating the evils of intemperance, it is my opinion that it is the duty of the Police Department to suppress the sale of these bitters (if sold without a license),

unless it can be shown affirmatively that the said liquors cannot be used as intoxicants.

Very truly yours,

LOUIS SALINGER,
Assistant Corporation Counsel.

Approved:

CHARLES M. HAFT,
Acting Corporation Counsel.

**Procedure of Commissioner of Health in Abating
Nuisances.**

July 24, 1915.

HON. JOHN DILL ROBERTSON, M. D., Commissioner of Health.

Dear Sir:

You referred to this department a series of questions relating to the course to be pursued by the commissioner of health in the matter of abating nuisances, which we will answer in the order in which they are presented.

You first call attention to Section 1424 of The Chicago Code of 1911, which requires the commissioner of health to serve a notice in writing upon the owner, occupant or person in possession or control of any lot, building or premises in or upon which any nuisance may be found, and you ask whether such written notice is required in the case of nuisances specifically defined and prohibited in other parts of the code.

This question arises from the fact that in succeeding sections of the same article, a number of nuisances are expressly defined and prohibited, and a penalty prescribed for causing or permitting them to exist. We do not understand that Section 1424 is intended in any way to do away with the penalty prescribed for the specific offenses enumerated in other sections, but at the same time, we believe it is intended by the City Council that in every instance, written notice shall be given. In other words, our understanding of said section is, that it serves a two-fold purpose. It is intended in the first place that notice shall be given in order

that the person who is creating or permitting the nuisance shall have an opportunity to abate same within the reasonable time allowed—otherwise the commissioner of health would have the power to abate such nuisance at the expense of the party responsible therefor.

Summary abatement is within the power of the commissioner of health in cases where, in his discretion, it may be necessary. This is provided for in Section 1428, but in all cases where such summary abatement is not necessary, the ordinances contemplate that notices shall be served as indicated above. The service of such notice and the abatement of the nuisance within the time prescribed, does not necessarily do away with the penalty where one is specifically provided.

A second purpose which Section 1424 is intended to serve is, that in all cases where a nuisance exists that is not specifically prohibited, notice may be given, and in such case a penalty attaches only if the person so notified neglects or refuses to comply with the requirements of the order by abating same within the time specified.

You next inquire whether a general order authorizing police officers to act as agents for the commissioner of health, printed in the police bulletin or a special hand-book of instructions distributed to all policemen, would be sufficient to delegate the necessary authority to such police officers. We are of the opinion that any general order sent out in any form that the general superintendent of police deems proper would be sufficient authorization for serving written notices prepared in the Department of Health. In this connection we call your attention to the clause in Section 1424, which reads as follows:

“* * * such notice may be given or served by any officer who may be directed or deputed to give or make the same.”

The ordinance clearly contemplates that a police officer may be used for this purpose without further formality in the way of delegating authority from the commissioner of health.

You next inquire whether in case of violation of any

section of the Sanitary Code wherein notice, either written or verbal, of a police officer to abate such violation has not been complied with, it would be possible for the police officer to serve summons directing the persons responsible for such violation to appear in court at a specified time for trial. Since you call attention to notice, either written or verbal, we beg to emphasize the point made above, that in case of nuisances the notice to abate must be written. As to all other violations of the code, unless expressly provided for by ordinance, we do not consider notice a prerequisite before prosecution, nor is notice a prerequisite for prosecution, as stated above, in cases where a nuisance is specifically prohibited, although the same is required in order to enable the offender to abate the nuisance even if prosecution is started in the first instance. We understand the general practice is to give notice in all cases before beginning a prosecution, but that is intended for the purpose of avoiding the necessity of starting prosecutions and imposing penalties, and is not required by ordinance.

So far as serving the summons is concerned, a police officer cannot do that before the same is issued by the Municipal Court. This would require the filing of a complaint. There is provision, however, in the Municipal Court Act for the arrest of a person committing an offense on view by a police officer, and this power is not limited in any way. Therefore, if the police officer has reason to believe that a person whom he has himself seen violating an ordinance cannot be brought into court by means of a summons he has the right to arrest him. This right exists only, however, where the police officer has himself seen the offense committed. In all other cases, a summons must issue, unless the person making the complaint makes an affidavit that he has reasonable grounds to believe that the party charged is guilty and will escape unless arrested and states the facts upon which such belief is based.

Hence, there is no such procedure authorized as in the case of the violation of the state law pertaining to the operation of automobiles, as suggested by you in your letter. In those cases the person who is notified to appear in court is in contemplation of law under arrest, and the only reason why he is permitted to come without escort of the officer is that

it is regarded as reasonably certain that the party will appear; and a special arrangement has been made, with the sanction of the chief justice of the Municipal Court, by which arrests can be made in this way.

Your next question relates to whether a police officer has the right to arrest in case notice has been given and has not been complied with. This has already been answered in the affirmative, but it must be understood that such power of arrest exists only in case the police officer himself is a witness of the violation of the ordinance, that is to say, in case notice has been served and the party continues to violate the ordinance in the presence of the police officer, the officer has the right to make an arrest under the law. The extent to which this power should be exercised is a matter solely within the discretion of the head of the department which has served the notice and the general superintendent of police.

Your last question relates to the procedure that is applicable in case any one of those set forth in the preceding questions cannot be followed in all instances. We believe that we have been sufficiently definite in fixing the limitations in each instance so that it will be unnecessary to indicate other methods of procedure. It has been the practice to avoid making arrests for violations of city ordinances wherever possible, and this practice is founded on good reasons. In the first place, the law does not look upon a person found guilty of violating an ordinance as a criminal, and therefore it is advisable in all cases where there is no reason for adopting a different course to prosecute as in civil cases. In the second place, it relieves the Police Department of a great deal of censure and criticism that would otherwise be directed against it if the officers made arrests freely for such violations instead of serving summons.

We believe the above covers all the points in which you ask to be advised.

Yours very truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

CHARLES M. HAFT,

Acting Corporation Counsel.

Issuance of Permits and Badges to Osteopaths and Other Practitioners.

July 27, 1915.

HON. JOHN SIMAN, City Clerk.

Dear Sir:

In your letter of recent date you inquire whether the permit for right of way and badge provided for in Section 2479 of The Chicago Code of 1911, may be issued to osteopaths and other practitioners.

The section in question authorizes the mayor and city clerk to issue, upon written application therefor, a permit and a suitable badge giving the privilege of the right of way to "any duly registered physician or surgeon residing or practicing in the City of Chicago."

The section immediately after the above reads, as follows:

"2480. CERTIFICATE FROM STATE BOARD OF HEALTH.) The mayor and city clerk, before issuing any such permit or badge, shall obtain from the State Board of Health a certified list of all regular practicing physicians, licensed by such board of health, and residing or practicing in the city, and such permit and badge above referred to shall only be issued to those physicians or surgeons who shall be so certified by the State Board of Health."

From Section 2480 it will appear that no one is entitled to a permit and badge unless he is registered with the State Board of Health as a physician or surgeon. The words "regular practicing physicians" must be understood to refer to those who have an unlimited license to practice medicine and surgery, as distinguished from those who have the limited license provided for in the statute regulating the practice of medicine and as distinguished from the persons who procure certificates as "practitioners" and "midwives" under said act.

The city clerk has nothing to do with determining the qualifications of any person or the effectiveness of his mode of treatment, and cannot regard him as a "regular practicing

physician," no matter how large his practice or how well qualified he may be to treat human ailments, unless he is on the certified list issued by the State Board of Health as a regular practicing physician. In other words, the duty of the city clerk is purely ministerial, and he has no discretion in the matter, the issuance of the permit and badge depending entirely on how the applicant is registered by the State Board of Health.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

CHARLES M. HAFT,
Acting Corporation Counsel.

Building Permit for the Second Regiment Armory.

July 29, 1915.

HON. CHARLES BOSTROM, Commissioner of Buildings.

Dear Sir:

Some time ago the Department of Buildings submitted copies of correspondence in regard to the erection of the Second Regiment Armory building at the corner of Madison street and Washtenaw avenue, with a request for advice as to whether or not it should be insisted that permit be taken out in the usual form for this building.

The Armory is a state institution and is being erected in pursuance of an Act of the Legislature approved June 9, 1911. We do not believe the city has any jurisdiction in the matter, and no building permit is required for same if the building is to be used exclusively for state purposes.

We are further informed, however, that it is the intention to use this building, when erected, for purposes of entertainments for which it will be rented out by the Second Regiment Infantry. If that is the case, it will be necessary for the managers of the building to secure an amusement license and all formalities and requirements of the ordinances will

have to be lived up to just the same as if it were not a building erected under the supervision of the state.

We recommend that a copy of this letter be forwarded to the city collector, so that he may have it before him in case an amusement license is applied for at some time in the future.

We return herewith two letters of C. E. Carson and copies of two letters addressed to C. E. Carson & Co. by the commissioner of buildings.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,
Corporation Counsel.

Residence of Civil Service Employees.

August 2, 1915.

HON. A. M. SWANSON, Secretary, Civil Service Commission.

Dear Sir:

Your letter of July 19th requesting an opinion as to whether a civil service employe of the city may take up his residence outside the city limits after he has properly qualified and entered the city's employ, it being understood that local residence was not waived at the time of the examination, received.

A portion of Section 6 of the Civil Service Act is as follows:

“Sec. 6. EXAMINATIONS. All applicants for offices or places in said classified service, except those mentioned in Section 11, shall be subjected to examination, which shall be public, competitive and free to all citizens of the State of Illinois * * * with limitations specified * * * as to residence, age, sex, health, habits, moral character * * *.”

In accordance with the authority granted them in this section of the act, the Civil Service Commission passed Sec-

tion 2 of Rule 2 concerning applications of persons desiring to take examinations for employment under civil service as follows:

“Sec. 2. RESIDENCE. No person shall be admitted to examination for any position in the classified service who has not been an actual resident of the City of Chicago for at least one year next preceding date of examination; provided, however, that in examinations for offices or places requiring technical, professional or scientific knowledge and experience or manual skill of a high order, this rule may be waived by the commission by an order entered in its minutes.”

This portion of Section 6 of the Civil Service Act and said Section 2 of Rule 2 apply only to the residence of the applicant and do not require a continued residence of a civil service employe within the city limits after the examination and appointment.

The Civil Service Act has no provision requiring a civil service employe after examination and certification to continue to reside within the city limits. Neither has the Civil Service Commission passed any rule which provides that this shall be a test of the continued eligibility of a civil service employe after examination and certification. This question of whether a civil service employe must continue to reside within the city limits must therefore be determined from common law principles.

The courts have held that the position held by a civil service employe is in the nature of an office.

Hughes v. Traeger, 264 Ill. 612.

Gathemann v. City of Chicago, 263 Ill. 292.

The courts have held that an officer who moves out from the district for and from which he was elected or appointed and abandons his official duties, resigns by implication, even in the absence of a statute requiring such officer to reside within his district.

Mechem on Pub. Officers, Sec. 439.

Dennison v. Spencer, 101 Ill. App. 61.

The same rule of law was applied to a civil service employe in the case of *Jacobsen v. City of Chicago*, decided by

the Appellate Court on February 24, 1915, which has not yet been reported. The essence of this implied resignation lies in the abandonment of the duties of the office or position and not in the removal from the district in the absence of statutory provisions. There is no case which holds that an officer resigns by implication merely because of the fact that he moved outside of the district which he represents unless a residence within the district is required by statute.

We are therefore of the opinion that a civil service employe of the city, who takes up his residence outside of the city limits after he has properly qualified and entered the city's employ but continues to perform the duties of his position, is not disqualified from continuing in the service of the city in the absence of a rule of the Civil Service Commission prohibiting civil service employes from residing outside of the city limits.

Yours truly,

JOHN E. FOSTER,

Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,

Corporation Counsel.

Jurisdiction of City Over Building of Field Museum.

August 2, 1915.

HON. CHARLES BOSTROM, Commissioner of Buildings.

Dear Sir:

You requested this department to furnish you an opinion as to whether the city has jurisdiction in connection with the new Field Museum building for which piles are now being driven at 12th street and the Lake Front.

You state that no permit has been procured by the builder and that no plans have been submitted to your department for approval, and you are anxious to learn whether your department has any jurisdiction in connection with the erection of the building in question.

The question arises because the Field Museum is to be located on the property owned and under the control of the South Park Commissioners. The South Park Commissioners do not own the new building. The building is to be constructed under a contract arrangement between the South Park Commissioners and the present owners of the Field Museum. This contract is sanctioned under Section 1 of "An Act Concerning Museums in Public Parks." Said Section 1 provides:

"Sec. 1. That the corporate authorities of cities and park districts having the control or supervision of any public park or parks, are hereby authorized to purchase, erect and maintain within any public park, under the control or supervision of such corporate authorities, edifices to be used as museums for the collection and display of objects pertaining to natural history or the arts and sciences, or to permit the directors or trustees of any museum devoted to either of the purposes aforesaid to erect and maintain its museum or museums within any public park now or hereafter under the control or supervision of any city or park district, and to contract with the directors or trustees of any such museum or museums relative to the erection and maintenance thereof."

The South Park Commissioners came into existence under an act of the Legislature entitled "An Act to Provide for the location and maintenance of a park for the Towns of South Chicago, Hyde Park and Lake." (Approved February 24, 1869.) Section 13 of this act, which relates to the powers of the South Park Commissioners, provides as follows:

"Sec. 13. POWER TO GOVERN. The said board shall have *the full and exclusive power to govern, manage and direct said park*; to lay out and regulate the same; to pass ordinances for the regulation and government thereof; to *appoint such engineers, surveyors, clerks, and other officers, including a police force, as may be necessary*; to *define and prescribe their respective duties and authority*; *fix the amount of their compensation*; and, generally, in regard to said park, they shall possess *all the power and authority now by law conferred upon, or possessed by, the Common Council of the City of Chicago, in respect to the public squares and places in said city*; and it shall be lawful for them to commence the improve-

ment of said park as soon as they have obtained one hundred acres of the premises herein described.”

Under the above section, the powers of the South Park Commissioners, for the purposes for which the park district is organized, with respect to the territory under its control, are as complete as the powers of the City Council with respect to the City of Chicago. In other words, the City of Chicago and the South Park Commissioners are distinct and separate corporations. The powers of the City Council and the South Park Commissioners are not concurrent and the South Park Commissioners have exclusive authority within the scope of the powers as above set forth.

McCormick v. The South Park Commissioners, 150 Ill. 516.

West Chicago Park Commissioners v. City of Chicago, 152 Ill. 392.

(See also opinion of corporation counsel, p. 373, contained in Book of Opinions of the Corporation Counsel from April 15, 1907, to December 31, 1908, relative to the right of the Building Department to issue a permit and approve the construction of fire escapes on the United States Marine Hospital, said hospital being owned by the United States.)

(See also opinion of the corporation counsel, p. 7, contained in Book of Opinions of the Corporation Counsel from January 1, 1913, to October 5, 1914, relative to the jurisdiction of the Department of Electricity over electrical wire and apparatus to be installed in the new Ridge Park at Longwood Drive.)

In *McCormick v. The South Park Commissioners*, the court said at p. 523:

“By the plain language of the act, it seems clearly to have been the purpose of the Legislature to invest the South Park Commissioners with powers, generally, at least, as full and exclusive, in regard to the park, as that conferred upon or possessed by the City Council of Chicago in respect to public squares and places in said city, each holding by the same kind of tenure, and in relation to the respective subjects matter referred to, the one clothed with powers identical in extent with those vested in the other.”

In *West Chicago Park Commissioners v. Chicago, supra*, the court said at p. 401:

“In view of these various statutory provisions, it is perfectly plain that the West Chicago Park Commissioners are a municipal corporation, created for the purpose of laying out, establishing, improving and maintaining certain parks, boulevards and ways within the territorial limits of the City of Chicago, and *that it is given full and exclusive power and authority*, not only to lay out and improve, but also to govern, regulate, manage, control and direct the same, and that its power and authority in all these respects are plenary, and exclusive of that of the City of Chicago.”

Again at p. 403, the court said:

“That, within the scope of the purposes for which it was created, the corporation possesses all the powers of a municipal body does not seem to admit of serious doubt.”

At p. 405, the court said:

“The park board, within the purview of its powers, is a corporation endowed with the same corporate functions, derived from the same source, and exercised in substantially the same way, as the City of Chicago. It is in no sense a corporation organized to exercise a portion of the municipal powers and functions of the city, and in subordination to it, but, within its own sphere, it has the same rank, and the exercise of its corporate powers is as exclusive of any power on the part of the city to interfere, as if the two corporations occupied wholly separate areas of territory.”

It follows from the foregoing that the city has no power or authority to regulate the construction of buildings used for park purposes on property under the control of the South Park Commissioners, and that the city ordinances regulating the construction of buildings have no application to such buildings.

It is true that the building proposed to be erected is not owned by the South Park Commissioners, but is constructed under a contract arrangement. This, in our opinion, does not alter the situation since the contract arrangement, as heretofore pointed out, is expressly sanctioned by statute.

The question, therefore, should be viewed as if the South Park Commissioners were constructing the new building instead of the owners of the Field Museum.

Answering your question specifically, we are of the opinion that your department has no jurisdiction in connection with the erection of the new Field Museum now being constructed on the property of the South Park Commissioners, and that the ordinances requiring permits and the submission of plans have no application in the present case.

Yours very truly,

MAX M. KORSHAK,
Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,
Corporation Counsel.

Advance Payment of Salaries During Vacation.

August 5, 1915.

HON. CHARLES H. SERGEL, City Treasurer.

Dear Sir:

In response to your verbal request for an opinion as to your right to advance the salaries of employes who are about to leave on vacations which are authorized by the City Council and the heads of departments, we beg to say that we believe you are justified in making payment on vouchers drawn for the vacation period in advance of the regular time for payment.

The theory under which a vacation is granted is that the employe has earned the salary which he draws for that period and that it was in fact earned by his previous services and not through services which he may render in the future. Therefore, it would be entirely proper, from our point of

view, to advance the salary for that period as has been the custom in the past.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,
Corporation Counsel.

Regulation of Cab and Hack Stands.

August 5, 1915.

HON. CHARLES C. HEALEY, General Superintendent of Police.

Dear Sir:

Your favor of July 2, to which is attached a communication dated June 29th, from M. W. DeLaney, Sergeant Commanding Vehicle Bureau, with reference to cab stands, has been received.

You request this office to render an opinion for the guidance of your department concerning council action in respect to the matter above referred to.

Mr. DeLaney's communication is in part as follows:

"I would most respectfully direct your attention to the Council Proceedings of January 4, 1915. On page No. 2737 of said proceedings appears the following:

" 'Stand No. 26: The west side of North Dearborn St. from W. Madison St. to the south line of the first alley north thereof,'—while on the Council Proceedings of July 14, 1913, page No. 1472, appears the following:

" 'Stand No. 26: The south side of Madison St. extending one hundred and seventy feet west of the west line of Michigan Ave.'

"You will therefore note from the above that there have been two cab stands numbered No. 26.

"The Council Proceedings of June 21, 1915, again amend Sec. No. 2582 of The Chicago Code of 1911 as appears on pages Nos. 755, 756 and 757, abolishing Stand No. 25, which was used or occupied by public vehicles seating ten or more passengers, and providing for said

sight-seeing cars a stand numbered No. 18. The east side of S. Clark St. from the north line of Jackson Blvd. to the south entrance of the Federal Bldg., and from the north entrance of the Federal Bldg. to within twenty feet of the south line of Adams St. It also provides for the changing of the number of Stand No. 26, *created July 14, 1913*, to No. 25.

"The ordinance is further amended by establishing a new stand numbering same 'Stand No. 26' to be located at the north side and south side of East 8th street, from S. State street to S. Wabash avenue, and whereas the City Council has not provided for a number of this 'Stand No. 26' established January 4, 1915, and has not abolished said stand, I would most respectfully suggest that the corporation counsel render an opinion for the guidance of this bureau; giving such information as to whether this stand still legally exists, and if so, how the same should be numbered. * * *"

The particular question raised by Officer DeLaney is whether or not the action of the council taken at its meeting of January 4, 1915, page 2737, which establishes "Stand No. 26 on the west side of North Dearborn street from West Madison street to the south line of the first alley north thereof," is still in full force and effect.

The amendatory ordinance entitled "Section 2582: Cab and Hack Stands Established," passed by the City Council on June 21, 1915, pages 755, 756 and 757, provides in part as follows:

"Section 1. That Section 2582 of The Chicago Code of 1911, as amended on July 14, 1913 (Journal of the Proceedings of the City Council, page 1472), and as again amended on June 29, 1914 (Journal of the Proceedings of the City Council, page 964), be and the same is hereby further amended so that the entire section as amended shall read as follows:

"2582. CAB AND HACK STANDS ESTABLISHED.) Any vehicle licensed under the provisions of this article, subject to the exception contained in paragraph designating Stand No. 18, may stand at any one of the following places and at no other place while waiting for employment."

In the twenty-five stands therein provided for, there is no reference whatsoever made to a stand to be located on the

west side of North Dearborn street from West Madison street to the south line of the first alley north thereof.

In this connection, we would call your attention to the fact that the council at its meeting of July 15, 1915, (page 1312, Journal of the Proceedings of said meeting), amended Section 2582 with particular reference to Stand No. 18.

The council at the meeting of June 21, 1915, at pages 757 and 758, further amended Section 2582 of The Chicago Code of 1911, as amended, by inserting therein after the paragraph beginning "Stand No. 25," a paragraph reading as follows:

"Stand No. 26. The north side and south side of East 8th street from South State street to South Wabash avenue."

A subsequent statute revising the whole subject of a former one, and intended as a substitute for it, although it contains no express words to that effect, operates as a repeal of the former.

Illinois & Michigan Canal v. City of Chicago, 14 Ill. 334.

Bartlet v. King, 12 Mass. 537.

In the case of *McCormick v. The People*, 139 Ill. 506, the court states as follows:

"There is no rule of law which prohibits the repeal of a special act by a general one. * * * The question is always one of intention."

The question as to the legal status of Stand No. 26 established by the City Council at its meeting of January 4, 1915, page 2737, resolves itself into a matter of what the intention of the council was in its amendatory ordinance passed on June 21, 1915, hereinbefore referred to.

It appears that there is no express repeal of the ordinance passed by the council on January 4, 1915, establishing said Stand No. 26, but from the language employed in said amendments adopted by the council on June 21, 1915, quoted in part hereinbefore, it would seem that it was the intention to rescind by implication the council action of January 4, 1915, with reference to said Stand No. 26.

We are, therefore, of the opinion, in view of the above, that the action of the council taken on January 4, 1915, page 2737, relating to the establishment of a cab stand to be known as Stand No. 26 on the *west side of North Dearborn street from West Madison street to the south line of the first alley north thereof*, has by implication been *ipso facto* rescinded and rendered null and void, and that Stands numbered 1 to 25 (as indicated on pages 755, 756 and 757, subject to the amendment to Stand No. 18 passed by the council on July 15, 1915, page 1312) and Stand No. 26 (as noted on page 758 of the Council Proceedings of the meeting of June 21, 1915) are the only cab and hack stands that legally exist at the present time under and by virtue of Section 2582 of The Chicago Code of 1911, as amended, as hereinbefore indicated.

We return, herewith, Mr. DeLaney's communication referred to above.

Yours very truly,

JOHN A. COOKE,

Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,

Corporation Counsel.

Location of Hospital on Irving Park Boulevard.

August 5, 1915.

HON. JOHN DILL ROBERTSON, M. D., Commissioner of Health.

Dear Sir:

You submitted to us a plat showing the character of buildings located on Irving Park boulevard between Broadway and Sheridan road for the purpose of ascertaining whether a hospital which Dr. Max Thorak proposes to build in said block will require the consent of the owners of property situated therein. You also submitted figures showing that more than one-third of the total frontage in said block is given up to business purposes.

We deem it unnecessary to go into the analysis of the extent of the frontage or the proportion devoted to residence purposes, business purposes and vacant, since that is not what the question presented depends on. The right of the owner of property to use same for this purpose hinges on the number of buildings and their occupancy and not the extent of the frontage. In this connection we beg to call your attention to Sections 265 and 1219 of The Chicago Code of 1911, which are practically identical and which contain the following provision :

“It shall be unlawful for any person, firm or corporation to build, construct, maintain, conduct or manage in any block in which two-thirds of the buildings fronting on both sides of the street or streets on which the proposed hospital may front are devoted to exclusive residence purposes, any hospital, unless the owners of a majority of the frontage in such block, and the owners of a majority of the frontage on the opposite side or sides of the street or streets on which said building faces consent in writing to the building, constructing or maintaining, managing or conducting of any such hospital in said block.”

You will observe from the above quotation that it must be determined in the first instance how many buildings there are fronting on both sides of the street, and in the next instance, whether two-thirds of these buildings are devoted exclusively to residence purposes. If it should appear that the block is residential within the terms of this ordinance, then the consent to be obtained must be on the basis of the frontage.

Dr. Thorak submitted a plat similar to the one you forwarded to us to the writer several days ago, and an endorsement or memorandum was placed on same by the undersigned to the effect that if the plat was correct and showed truthfully the purposes to which the various buildings are devoted, no frontage consents would be required. We find from an examination of this plat that there are twenty-five houses on same; that fourteen of them are devoted exclusively to residence purposes and eleven of them are either stores or stores and flats combined. The writer was further informed at the time

the other plat was shown him, that the four corner buildings, two of which are marked stores, and two of which are marked stores and flats, all contained stores that fronted on Irving Park boulevard. If such is the case, there can be no question of the right of the owner of the property who desires to build to erect a hospital on the proposed site, since the buildings devoted exclusively to residential purposes would fall far short of being two-thirds of the whole number.

Dr. Thorak was warned at the same time that any building on the corner which did not front on Irving Park boulevard would not be included in making the computation. We call attention to this, because if upon investigation it should appear that all four of these buildings front on the other streets and have no stores that front on Irving Park boulevard, there would be twenty-one houses in the block, and the residential buildings would amount to two-thirds of that number and frontage consents would be required. If any one of these four, however, fronted on Irving Park boulevard, that would not be the case. Dr. Thorak's attention was called to this feature of the ordinance and he stated positively that all of the four buildings in question fronted on Irving Park boulevard, and therefore he can hold no one to blame, if upon investigation by the Building Department a different state of facts should appear.

We therefore recommend that before a permit is issued, an investigator be sent to the proposed site to check up on this point, and if it is found that any one of the corner buildings fronts on Irving Park boulevard the permit can lawfully issue.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,
Corporation Counsel.

Extent of Power to Issue Tax Anticipation Warrants.

August 5, 1915.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

We are in receipt of your letter of recent date in which you inquire whether it would be lawful to issue tax anticipation warrants to the extent of seventy-five per cent of the tax levy made by the city.

You call attention to the fact that you are entirely familiar with the opinion rendered by this department on September 1, 1914, which sets out at length the view of the writer in regard to this matter. We are convinced that the position taken at that time is well founded in law.

Section 2 of Chapter 146a of Hurd's Revised Statutes for 1913 gives authority to the proper officers of the city to issue and dispose of warrants "drawn against and in anticipation of any taxes already levied by said authorities for the payment of all such ordinary and necessary expenses of such county, city, town, village or other municipal corporation, to the extent of seventy-five per centum of the total amount of any such tax levied."

As stated in the former opinion, the strict letter of the law would not make it necessary for you even to take into account levies made for purposes of sinking funds. If thus strictly construed, the law would authorize the issuance of seventy-five per cent of the total amount of the tax levy. We are inclined to hold to our opinion, however, that the Legislature did not intend that warrants should be issued to such an extent as to impair the levy for sinking funds.

We believe, however, that you are strictly within both the letter and the spirit of the law if the issuance of tax anticipation warrants does not run beyond seventy-five per cent of the tax levy, after deducting therefrom the levies for the Tuberculosis Sanitarium, the Library, the Board of Education, and the levies for sinking funds.

If the levy is reduced by deducting the above, it would

amount in round numbers to about \$14,000,000. The total assessed valuation of city property for the year 1914 was \$1,000,831,553. This amount will produce a minimum revenue of \$11,009,147.08. It is hardly possible that the total assessed value of property in the city will be less for the year 1915 than for the year 1914, and therefore it can be safely assumed that even if you issue tax anticipation warrants to the full extent of seventy-five per cent of the tax levy, after making the reductions suggested above, you would still have one-half million dollars latitude, sufficient for every conceivable contingency.

From reports at hand, it would seem that the assessed valuation this year will be very largely increased over that of last year, and therefore the leeway given is even greater than if last year's figures were taken as the basis for computation. In any event, if through some great catastrophe there should be a material reduction in the revenue derived from taxation, provision is made in the statutes to meet such an emergency, and you are not bound to take it into account in estimating the revenues to be derived from taxation. You would be protected by the express provision of the law which we have quoted and which may be safely followed.

We have no doubt that the margin of twenty-five per cent which the statute provides was intended to cover not only any possible shrinkage that was unforeseen, but also any reduction that may be caused by the operation of the Juul Law. We are led to this opinion by the fact that the amended act for the issuance of these warrants was passed after the Juul Law had been in effect for twelve years, and yet no limitation was placed in the law which took into account the possible reduction of taxes thereunder.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,
Corporation Counsel.

**License for Automobile Operated for Purpose of Selling
Products of Manufacturer to Trade.**

August 5, 1915.

HON. JOHN SIMAN, City Clerk,

Dear Sir:

We are in receipt of your communication of August 2, 1915, enclosing a letter received by you from the Nuubson Baking Company, Inc., of Duluth, Minnesota, in which they state that their company operates a cash automobile car in Duluth, calling on grocers only and selling them diamond crisp wafers at wholesale once every two weeks or less often.

In their communication to you, they state that they contemplate putting a car of this character in our city and ask to be advised, as early as possible, what the fee is for city license, wheel tax, or any other taxes per annum for this automobile.

They make the statement in their letter that their auto is not a peddling device, and that it calls only on merchants.

Section 1760 of the Municipal Code of 1911 defines a peddler to be:

“Every person who shall sell or offer for sale, barter or exchange at retail any goods, wares, merchandise, fruits, vegetables or country produce, traveling from place to place on, along or upon the streets of the city, or who shall sell and deliver from any wagon, pushcart or other vehicle going from place to place, any goods, wares, merchandise, fruits, vegetables or country produce, or who shall go about from place to place selling and delivering goods, wares, merchandise, fruits, vegetables or country produce, shall be deemed a peddler and shall before engaging in such business obtain a license as a peddler as hereinafter provided.”

After a careful perusal of this ordinance and examination of the decisions of the Supreme Court of the State of Illinois in the cases of *Village of Cerro Gordo v. Rawlings*, 135 Ill. 36; *Emmons v. City of Lewistown*, 132 Ill. 380 and *City of Chicago v. Bartee*, 100 Ill. 57, in which the Supreme Court said that the term “peddler,” as used in the statute,

was to be taken in its general and unrestricted sense and embraced only persons engaged in going through the city from house to house selling commodities, we are of the opinion that the automobile that the Nuubson Baking Company intend to operate in this city, in charge of a city salesman, does not come within the ordinance defining peddlers, and that they should not be required to obtain a peddler's license before operating the same.

The only license necessary for them to pay the City of Chicago is the vehicle tax license provided by the city ordinances, the amount of which will depend upon the character of the automobile they desire to operate.

In addition to paying the city vehicle tax, they may, of course, be required to pay a state tax as well as a personal property tax to Cook County.

If you communicate these facts to the Nuubson Baking Company, you will fully and completely answer their communication to you. You cannot tell them now the amount of the vehicle tax they will have to pay unless they advise you of the size of the car they desire to operate.

We return, herewith, your enclosure.

Yours very truly,

JAMES W. BREEN,
Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,
Corporation Counsel.

Distribution of Samples of Medicines.

August 6, 1915.

HON. CHARLES C. HEALEY, General Superintendent of Police.
Dear Sir:

We are in receipt of your favor of August 2nd, enclosing a communication from the attorney of The Proprietary Association, in which communication they complain of the con-

struction placed upon Section 811 of the Municipal Code. The ordinance in question is as follows:

“No person shall be permitted to give away, deposit or otherwise distribute any sample package, parcel, box or other quantity of any nostrum, proprietary medicine or other material of an alleged medical character or purporting to be a curative agency, by means of depositing or leaving same in any hallway, private area or yard, or on any doorstep or in any place in any street, alley or public ground in the city.

“Any person violating any of the provisions of this section shall be fined not less than five dollars nor more than fifty dollars for each offense.”

The question raised by your correspondent is whether or not clients of his who employ men to go about the streets handing out samples of medicine marked “Hand it to adult” can be charged with violating the above ordinance.

The ordinance in question is penal in its character and consequently must be strictly construed.

We are of the opinion that the above ordinance does not prohibit the distribution of samples of patent medicine, except, as stated in said ordinance, “by means of depositing or leaving same in any hallway, private area or yard, or on any doorstep or in any place in any street, alley or public ground in the city.”

The contention of your correspondent that the “Hand it to adult” distribution is not within the purview of the ordinance in question, is in our opinion well taken.

We return herewith your enclosures.

Very respectfully,

JAMES W. BREEN,
Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,
Corporation Counsel.

Use of Lower Floors of Hospital.

August 6, 1915.

HON. CHARLES BOSTROM, Commissioner of Buildings, Chicago.

Dear Sir:

We are in receipt of yours of July 6, 1915, transmitting letter of A. R. Johnstone, President of the Lakeside Hospital, requesting permission to use the third floor of said hospital which is located at 3410 Rhodes avenue.

Your department desires an opinion as to whether it should grant permission to the Lakeside Hospital to use its third floor for hospital purposes.

It appears that the Baptist Hospital Association formerly conducted a general hospital for about twenty years in the building now occupied by the Lakeside Hospital and that the Baptist Hospital Association discontinued business on January 1, 1912. After a lapse of fourteen months the Lakeside Hospital moved into the building formerly occupied by the Baptist Hospital.

According to your letter, former Building Commissioner Eriesson took the position that the building had been vacated and abandoned for hospital purposes by the Baptist Hospital Association, and for this reason refused to permit the Lakeside Hospital to occupy the building unless the Lakeside Hospital would comply with Section 264 of The Chicago Code of 1911. This section provides that all buildings more than two stories in height "*hereafter erected for or converted to the purposes*" of a hospital shall be of fireproof construction. This section permits buildings not more than two stories in height used for hospital purposes to be of "*ordinary*" construction.

The building in question is of *ordinary* construction and when the Lakeside Hospital made application to use this building, the former building commissioner treated the building as one "*hereafter erected for or converted to the purposes*" of a hospital, and since the building was not of fireproof construction but of ordinary construction, refused to

permit the use of the entire building, but restricted the hospital to the use of the first two stories, under Section 264, which permits buildings not more than two stories in height to be of "*ordinary*" construction.

The question presented is one of fact. If it is a fact that the building was abandoned and vacated as a hospital prior to the time the Lakeside Hospital made application to use the building, then Section 264 would govern and you would be justified in refusing permission to the Lakeside Hospital to use its third floor for the reason that the building is not of fireproof construction. If, on the other hand, the building occupied by the Lakeside Hospital has never lost its distinctive character as hospital property and has not been abandoned so far as its use for hospital purposes is concerned, then Section 264 would not apply, and the Lakeside Hospital would be entitled to permission to use the third floor of its building for hospital purposes.

The writer has taken this matter up in detail with Mr. Thomas K. Johnstone, secretary and treasurer of the Lakeside Hospital. From the affidavit furnished us by Mr. Johnstone as well as from conversation had with him it appears that the Baptist Hospital Association formerly owned the property and discontinued business on January 1, 1912.

The University of Chicago had a mortgage on the hospital building and instituted a foreclosure suit against the Baptist Hospital Association. Prior to the vacation of the building by the Baptist Hospital Association the Lakeside Hospital made arrangements with Wallace Heckman, who represents the University of Chicago, to take a lease on the premises as soon as possession could be had.

The foreclosure proceedings covered a period of fourteen months and during this period there never was any intention to abandon the building for hospital purposes, and it was understood between Mr. Heckman, owner of the equitable title for the University of Chicago, and Mr. Johnstone that the Lakeside Hospital would take possession of the property as soon as the foreclosure suit would be terminated.

It also appears from the affidavit and conversation had

with Mr. Johnstone that precaution was taken to prevent the property from being unnecessarily damaged while the foreclosure suit was pending, and that a caretaker was placed in charge of the building; that the equipment of said Baptist Hospital Association remained in the premises during the fourteen months above referred to, and that this equipment consisted of an operating room with equipment, furniture, dressers, wardrobes, beds, bedding, mattresses and utensils usually used in hospitals, as well as a complete laundry equipment with machinery, etc., all of which property remained in the premises until taken over by the Lakeside Hospital.

Assuming the facts stated in the affidavit and to the writer in person, are true as above set forth, we do not believe the building in question can be treated as one "*hereafter erected for or converted to the purposes*" of a hospital.

The building has never lost its character as a hospital building although temporarily it was not used for hospital purposes.

We do not believe that the failure to use the building for hospital purposes for a period of fourteen months can be considered as an abandonment of the building for hospital purposes when the intention of all parties to the transaction was that the Lakeside Hospital should occupy the building as soon as the legal obstacles could be overcome, and when in fact the building was used for no other purpose during said period of fourteen months.

We have no reason to believe that the facts as given us in the affidavit and by Mr. Johnstone are untrue; and unless you find the facts otherwise than those upon which this opinion is based, we must advise you that Section 264 of The Chicago Code of 1911 has no application to this building and that your department may rightfully grant permission to the Lakeside Hospital to occupy the third floor of its building.

Respectfully submitted,

MAX M. KORSHAK,

Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,

Corporation Counsel.

August 9, 1915.

HON. WILLIAM R. MOORHOUSE, Commissioner of Public Works.

Dear Sir :

We have your letter of August 2d, in which you refer to an opinion rendered by this department on April 23, 1915, to the effect that since a plat was not recorded in the recorder's office of Cook County showing Western avenue from 87th street to a point four miles south to have been widened to one hundred feet by virtue of proceedings before the highway commissioners of the Towns of Worth and Calumet in 1873, those proceedings were incomplete and condemnation proceedings will be necessary to secure the removal of certain buildings which have been erected on the eighty foot line. You ask whether the defect, at least so far as the strip of land appropriated for the purpose of widening the street is now unoccupied by obstructions, may be remedied by filing a plat with the county recorder at this time.

We beg to advise you that we find it necessary to correct the opinion formerly rendered. The only provision in the act concerning "roads and bridges in counties under township organization," under which the proceedings before the highway commissioners took place, in regard to recording a plat of the highway, is the following:

"In case the commissioners shall not revoke such prior proceedings, they shall make an order, to be signed by them, declaring such road so altered, widened or laid out, a public highway, and which order shall contain or have annexed thereto a definite description of the line of such road, together with a plat thereof. The commissioners shall, within 10 days from the date of such order, cause the same, together with the report of the surveyor, the petition and releases or agreements in respect to damages, to be deposited and filed in the office of the *town clerk*, who shall note upon said order the date of such filing."

On July 1, 1874, a law became effective requiring plats of highways to be recorded in the office of the county recorder (Hurd's Revised Statutes, Chapter 109, Section 9), but the proceedings of the highway commissioners appear to have been completed before this law took effect. We have examined a certified copy of the record of the highway commissioners, and find that the abutting property owners released all claims to damages sustained by them as the result of widening Western avenue on April 20, 1873, and that the final order of the highway commissioners providing for the widening of Western avenue was entered on May 10, 1873. Our understanding is that a plat of the widened highway, together with the other necessary papers, were filed with the town clerks of the Towns of Worth and Calumet in accordance with the statute under which the commissioners acted. We are, therefore, of the opinion that the provisions of the statutes in force at the time of the proceedings were fully complied with.

There is another consideration, however, which brings us to the result reached in our former opinion, namely, that the removal of the buildings now occupying a portion of the street cannot be brought about, in the absence of an agreement with the owners of the buildings, except by condemnation proceedings. The basis of this conclusion is that we are advised by Superintendent of Maps Riley that, in 1890, 1891 and 1892, subdivisions of certain portions of this territory were presented to the examiner of subdivisions of the City of Chicago for approval, and he, apparently without knowledge of the highway commissioners' widening proceedings, approved the subdivisions on the basis of an eighty foot street instead of one hundred; that on the basis of the recorded width of Western avenue the buildings in question between 91st and 92nd streets were erected on the eighty foot line. This would work an effective estoppel against the city if an effort were made to force the owners of these buildings to remove the structures by virtue of the proceedings before the highway commissioners.

This estoppel would also operate in favor of other per-

sons, if any, who have placed reliance upon the public record showing Western avenue to be eighty feet in width, either by placing structures on the strip between the eighty and one hundred foot line, or by purchasing lots in the belief that they extended to the eighty foot line. It would be advisable to correct the public record of these subdivisions by filing in the county recorder's office such plats as may be necessary to show Western avenue to be one hundred feet wide at the location in question. This will serve to prevent an estoppel arising in the future in favor of persons who may acquire these lots or in any case where the estoppel has not already arisen.

Yours very truly,

RALPH G. CRANDALL,
Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,
Corporation Counsel.

Definition of Broker.

August 11, 1915.

HON. CHARLES J. FORSBERG, City Collector, Chicago.

Dear Sir:

In reply to yours of June 4th, in which you request an opinion from this department as to whether salesmen in the employ of the Chicago Title & Trust Company, who are handling the property in the subdivision known as Marquette Manor, can be classified as brokers under the ordinances of the City of Chicago, we beg leave to reply as follows:

Section 194 of The Chicago Code of 1911 defines a broker as follows: "A broker is one who is engaged for others in negotiating contracts relative to property, with the custody of which he has no concern."

Section 195 defines a real estate broker as follows: "A

real estate broker is one who is engaged for others in negotiating contracts relative to real estate."

From the report of James B. May which accompanied your letter it appears that subdivision offices are erected in the subdivision known as Marquette Manor about one-half mile apart; that the salesmen in said offices claim that they are employed by the Chicago Title & Trust Company, which concern pays them a commission on the property which they sell; and you further inform us that the Chicago Title & Trust Company advertises itself as the owner of this property.

In *City of East St. Louis v. Brenner*, 59 Ill. App., on page 609, the court uses the following language:

"The business of a 'broker' is to represent all parties, buyers or sellers, in his line. His business, as a business, is not to represent simply one person or company. * * * In the other case 110 Ill. 186, the parties held themselves out as brokers. Braun, as a business, sold produce on percentage for whoever employed him, as Lyman & Giddings negotiated the sale of real estate for whoever employed them. Neither party represented merely one person's business like appellee."

We are, therefore, of the opinion from the above decisions and the statement of facts furnished by you that if these salesmen are employed by the Chicago Title & Trust Company only, and are engaged in negotiating contracts and selling real estate in the subdivision above described for the said company exclusively, they cannot be classified as brokers under the ordinances above set forth, as they do not represent all parties, buyers or sellers in their line, but represent simply one company.

Yours Respectfully,

LEON EDELMAN,
Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,
Corporation Counsel.

Status of Minors with Respect to Municipal Pension Fund.

August 11, 1915.

To the Board of Trustees of the Municipal Pension Fund,
Chicago.

Gentlemen :

We are in receipt of your communication of August 4, 1915, asking for an opinion on the amended portion of the Municipal Pension Fund Act known as House Bill No. 426, relative to that portion which deals with the exemption of employees who have not yet reached their twenty-first year.

In your communication you state that you have received numerous inquiries from employees who are still in their minority and those who were minors at the time the act became effective, July 1, 1911, and who have since reached their majority, as to whether they are entitled to any refund for the amount deducted from their salaries or wages during their minority.

In reply, we beg to advise you that the original Municipal Pension Fund Act in effect July 1, 1911, made no exception whatever as to minors, and they were included within the scope of the act as passed, and under the law it became the duty of the comptroller to deduct \$2.00 a month from the salaries of minors.

Section 1 of this act has been amended by the last General Assembly by providing "that the provisions of the act shall not apply to employees who are less than twenty-one years of age." The act as amended became effective July 1, 1915, and as a result of said amendment the comptroller is not authorized to deduct the \$2.00 a month from any minor. The minors are not permitted to participate in the pension fund during their minority.

As to those members of the pension fund who were minors when the law became effective July 1, 1911, and who attained their majority prior to July 1, 1915, when the amended law became effective, their status is in no wise affected by the law as amended. They are in the same position under the amended

law as they were under the old one. The money deducted from them during their minority was deducted in accordance with the law then in force and they have no claim of any kind whatever for a refund thereof.

In regard to your inquiry as to whether minors who were contributors to the pension fund up to July 1, 1915, and who have not yet reached their majority are entitled to any refund for the amount deducted from their salaries or wages during the time they were permitted to participate in the pension fund, we beg to advise that the Board of Trustees of the Municipal Pension Fund is a quasi-municipal corporation and that it possesses only such power as is expressly conferred by statute.

Town of Drummer v. Fox, 166 Ill. 648;

City of Chicago v. Blair, 149 Ill. 310.

The only power vested in your board to make refunds of any kind whatever to parties who have contributed to your fund is contained in Section 6 of the act in force July 1, 1915, which is as follows:

“Said board shall have the power and it shall be its duty to authorize the payment to any employe who may be separated from the service of any city, village or town by the abolishment of his or her position before such employe shall have qualified for a pension, an amount equal to the amount deducted from the salary or wages of such employe: Provided, that such employe shall release said board from all future liability upon receipt of said sum.”

We are of the opinion that it was the intention of the Legislature, in passing the said section, to authorize your board to grant refunds to any employe who might happen to be, through no fault of his or hers, forever deprived from participating in the pension fund provided for in said act and still remain an employe of the city. Those employes of the city at the present time who have not yet attained their majority are excluded from participating in the pension fund solely on account of their minority, and just as soon as they reach their majority and remain city employes they will be permitted to again participate in said fund. The money de-

deducted from those minors was deducted properly and was in accordance with the law then in force and effect.

The amended Municipal Pension Fund Act became effective on July 1, 1915, and does not in any way apply to or affect any funds deducted from minors under the old law. The Board of Trustees of the Municipal Pension Fund does not possess any discretionary powers as to who are and who are not entitled to refunds.

The fund entrusted to your care is for a special purpose provided by law, and can only be distributed in accordance with law. We cannot by any process of reasoning bring the claim of these minors within the scope of the statute conferring power on you to make refunds.

Yours respectfully,

JAMES W. BREEN,
Assistant Corporation Counsel.

Approved:

CHARLES M. HAFT,
Acting Corporation Counsel.

Control of Typhoid Carriers.

August 11, 1915.

HON. JOHN DILL. ROBERTSON, M. D., Commissioner of Health.
Dear Sir:

Your letter in regard to "typhoid carriers" was referred to the undersigned for an opinion as to your powers in dealing with persons infected in this way.

You state that a person who is found to harbor typhoid bacilli in the intestinal tract or bladder is called a "carrier" of typhoid fever; that it has been demonstrated that such persons convey the disease to others; and that such "carriers" have been the cause of numerous epidemics of typhoid fever. You also state that you know of two of these cases among residents of Chicago, both of whom are women, one of them living with a sister in Chicago, the other at present in Oak Park but desirous of returning to a sister in Chicago, and that in each

case these parties have no other place to go to as a home. We infer from the tone of your letter that neither is stricken with the disease, but that nevertheless their systems are in such condition that they are likely to communicate typhoid fever.

The specific questions you ask are first, whether you have the right to forcibly take these women to an isolation hospital and detain them there until such time as it is found that they no longer excrete typhoid bacilli, and second, whether you have the right to isolate them at their homes.

While either method of dealing with these persons involves an extreme exercise of the police power of the municipality, we are of the opinion that you are justified in adopting such measures if, in your discretion, you regard such action as necessary to prevent the spread of the disease, even though the courts have sometimes interfered in cases of this kind.

One of the first duties of the municipality is to guard the health of its people, and any act done in furtherance of this duty, if it can be shown that it tends to lessen the danger of the spread of disease and is done in the method prescribed by law, is within the power of the city.

Dillon, in his work on Municipal Corporations (Fifth Ed., Secs. 304, 305, 306, 680) treats at length on the authority of the proper health officer to take all steps which he deems necessary to prevent the communication of disease by persons infected therewith. He quotes with approval the old but well-known and generally adopted ruling in the case of *Harrison v. Baltimore*, 1 Gill (Md.) 264, and shows that courts frequently have held that it was competent for the health officer to be authorized by ordinance to send not only persons laboring under infectious disease to the hospital, but also those that have been exposed to the contagion, as for instance persons on board of a vessel who are liable to be infected by it, "if, in his opinion, such a course be necessary to prevent the spread of disease." As a limitation on this power he quotes from the case of *Matter of Smith*, 146 N. Y. 68, where it was held that persons engaged in moving furniture in a locality

where small-pox is prevalent cannot be isolated merely because they are so engaged when there is no evidence that they have been actually exposed to infection.

In the Baltimore case above referred to the municipality was vested with "full power and authority to enact all ordinances necessary to preserve the health of the city, prevent and remove nuisances, and to prevent the introduction of contagious diseases within the city and within three miles of the same."

On this provision of the charter the Court of Appeals made the following, among other comments:

"The transfer of this salutary and essential power is given in terms as explicit and comprehensive as could have been used for such a purpose. To accomplish, within the specified territorial limits, the objects enumerated, the corporate authorities were clothed with all the legislative powers which the General Assembly could have exercised. Of the degree of necessity for such municipal legislation, the Mayor and City Council of Baltimore were the exclusive judges. To their sound discretion is committed the selection of the means and manner (contributory to the end) of exercising the powers which they might deem requisite to the accomplishment of the objects of which they were made the guardians. 'To prevent the introduction of contagious diseases within the city, and within three miles of the same,' they might impose heavy penalties on the captain, owner or consignee of any ship or other vessel entering the port of Baltimore, on board of which smallpox or other contagious diseases might prevail, or they might seek the accomplishment of their object by causing the vessel and all persons on board to be taken possession of and controlled until their purification and disinfection were effected. * * *"

Harrison v. Baltimore, 1 Gill (Md.) 264.

The same rule, of course, applies to all other structures and places as well as to boats.

A more recent decision on the points involved is that of *Kirk v. Wyman*, 23 L. R. A. (N. S.) 1188. In that case the court enjoined a board of health from sending an elderly lady of refinement to a pest house, but the circumstances were of such a nature that the rule in the Baltimore case is

not disturbed. The patient in that instance was afflicted with a mild form of leprosy which is only slightly, if at all, contagious and had mingled for years with people without communicating the disease to anyone. It was proposed to send her to a pest house which was shown to be unfit for habitation because of want of water supply and many other very objectionable features. The decision of the court was based on the view that quarantine in her own home would afford complete protection to the public until a comfortable place could be arranged for her elsewhere. The court stated a series of propositions in that case which are very helpful in arriving at a determination of the rights of the respective parties in matters of this kind. Among these was the following:

“Statutes and ordinances requiring the removal or destruction of property or the isolation of infected persons, when necessary for the protection of the public health, do not violate the constitutional guaranty of the right of the enjoyment of liberty and property, because neither the right to liberty nor the right of property extends to the use of liberty or property to the injury of others. The maxim, *Sic utere tuo ut alienum non laedas*, applies to the person as well as to the property of the citizen. The individual has no more right to the freedom of spreading disease by carrying contagion on his person, than he has to produce disease by maintaining his property in a noisome condition. * * *

“The state must of necessity lodge the power somewhere to ascertain, in the first instance, and act with promptness, when the public health is endangered by the unhealthful condition of the person or the property of the individual; and the creation by legislative authority of boards of health, with the discretion lodged in them of summary inquiry and action, is a reasonable exercise of the police power.”

The above is not the only case where the health officers have been restrained from acting, but, as will be seen by an examination of the following cases, when the courts do interfere the circumstances usually warrant the restraint of the power:

Eddy v. Board of Health, 10 Phila. 94;

Jew Ho v. Williamson, 103 Fed. 10;

Township of Summit v. City of Jackson, 154 Mich. 37.

Unless the circumstances are such as to show that there is no danger to the public the courts will not restrain the health officer.

20 Am. & Eng. Enc. L. 1230;

21 Cyc. 394;

Manhattan v. Hessin, 105 Pac. (Kan.) 44;

Aaron v. Broiles, 53 Am. Rep. 764.

It being clear that the removal and isolation of persons liable to spread disease is within the police powers of the state, we have but to refer to the statutes and ordinances to show that the power is lodged in the commissioner of health in this city.

Clause 78 of Article V, Section 1 of the Cities and Villages Act gives the city power "to do all acts, make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease." This delegates ample power to the city, and the city in turn has enacted ordinances placing the power to examine and remove afflicted persons or to isolate them in the commissioner of health. (See Sections 1190 and 1191 of The Chicago Code of 1911.)

It is true this power of the commissioner is limited to persons who are "reported to him as laboring, or supposed to be laboring, under disease" and "persons afflicted or sick" with a contagious or epidemic disease, but it is hardly to be assumed that a court will hold such a person as you describe as entirely free from disease.

It may be that there are peculiar circumstances connected with the two cases you mention which would render their removal or isolation harsh or unnecessary, and we recommend a careful inquiry in this regard in order to avoid the possibility of interference by a court. The very brief statement in your letter seems to indicate that you have the power to act in the matter, but that you are bound to act with caution. The law as given above will apply generally in cases of this kind, but

the courts will scrutinize your acts and protect the individual where the circumstances of the case or the condition of the patient does not warrant you in taking such extreme action.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,
Corporation Counsel.

Treasurer's Duties with Respect to Payment of Salaries.

August 12, 1915.

HON. CHARLES H. SERGEL, City Treasurer.

Dear Sir:

You referred to us copy of a communication received by you from the Civil Service Reform Association of Chicago, in which it is stated that certain persons named therein who are on the city's payroll are not occupying places of employment according to the provisions of law and are not entitled to payment therefor. Section 32 of the Civil Service Act is also quoted in said letter, the same being as follows:

“Section 32. No paymaster, treasurer or other officer or agent of a city which has adopted this act shall wilfully pay, or be in any manner concerned in paying any person any salary or wages for services as an officer or employe of such city, unless such person is occupying an office or place of employment according to the provisions of law and is entitled to payment therefor.”

You ask what your duty is under these conditions in view of the notice given you in the letter above referred to.

We are of the opinion that the law does not impose on you the duty of going behind regularly prepared and certified payrolls in order to ascertain whether a person whose name appears thereon as entitled to pay is lawfully occupying the position which he is filling, and this is true even if your at-

tention is called to the matter by such a notice as was served on you.

The duties of the treasurer are purely ministerial. To require him to look beyond a certification by the proper officers who are charged with the duty of preparing a correct payroll to ascertain whether these officers have done their duty would be placing a burden to determine judicially matters of great intricacy on the city treasurer and would subject him to responsibilities and risks which the law does not contemplate. The courts, as well as all other officers will presume that where an officer is required by law to do a thing he has done it according to law (29 Cyc. 1437), and a ministerial officer is bound to act on, and is protected when he acts on, an instrument in writing, valid on its face and drawn up in due form by the proper officer and the same is presented to him. Such officers as treasurers and sheriffs would continually expose themselves to enormous risks if they were required to exercise judicial functions when scrutinizing instruments which they act on.

We call your attention to the phraseology of the act quoted above which in itself negatives the idea that you are required to inquire into the title of a person holding a position under the city before paying his salary. The word "wilfully" has a fixed and definite meaning and it can be invoked as a defense as against such a notice as was given to you. Again, the words "occupying an office or place of employment" must be held to relate to the *de facto* officer or employe as distinguished from a person who only claims the right to hold it. This is true even if the claimant is really the *de jure* officer and the one who holds the position is a usurper. The court is the proper place for the claimant to assert his rights, and the public business cannot lawfully be obstructed by the mere service of notice to the effect that some unnamed person holds the title to an office which is actually filled by another.

In the case of *Burgess v. Davis*, 138 Ill. 578, an attempt was made to enjoin the county treasurer and others from paying the salary of a county judge. The court held that

injunction would not lie and that *quo warranto* was the only remedy. This case is in point because it holds that the test as to the right of a party to an office must be made through the means provided by law and not by the indirect method of enjoining the payment of the salary.

If the notice in the present instance were sufficient to authorize you to withhold payment of a warrant drawn for the salaries in question it would follow that any employe who feels himself aggrieved at being discharged could, by the mere service of written notice, prevent the payment of the salary of his successor. Such a course would not be warranted by law. There is a way provided for trying issues of this kind, and the person who complains must follow out the remedy prescribed by law.

In the present instance we beg to call your attention to the further fact that no party in interest has come forward with a protest, and the letter comes from outside parties who have no right to complain.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,
Corporation Counsel.

Rights of Employees with Respect to Municipal Pension Fund.

August 12, 1915.

To the Board of Trustees of the Municipal Pension Fund.
Gentlemen:

We are in receipt of your communication of August 4th, requesting us for an opinion as to whether or not your board should refund to Messrs. Luthardt, secretary to the superintendent of police, Markham, head clerk of the Police Department, and Bauder, drill master of the Police Department, the sum of \$96.00 each, and also whether or not

you should refund \$78.00 to one Cregier, all these different sums having been deducted from the salaries of the parties named at the rate of \$2.00 per month as provided by the Municipal Pension Law.

The Board of Trustees of the Municipal Pension Fund of Chicago is in law considered a quasi-municipal corporation, and as such, possesses no discretionary power at all to refund any money lawfully received by it for the pension fund or paid to it without any mistake in fact on the part of those contributing to said fund. It is a well settled law of this state that quasi-municipal corporations such as the Board of Trustees of the Municipal Pension Fund, being creatures of the Legislature, can only exercise such powers as are either mentioned in express words or can necessarily or fairly be implied to extend to the powers expressly granted, or such as are essential to the declared objects and purposes of the corporation.

City of Chicago v. Blair, 149 Ill. 310.

City of Cairo v. Coleman, 53 Ill. App. 680.

Seeger v. Mueller, 133 Ill. 86.

The ordinance affecting Mr. Cregier was passed on March 30, 1915, and took effect within the following week. On June 28, 1915, the Council passed an ordinance designating the secretary to the general superintendent of police, the head clerk in the detective bureau and the drill master in the Police Department as "policemen," and Section 5 of said ordinance provided that the said ordinance should take effect and be in force after its passage and approval. The ordinance in question was approved by His Honor, The Mayor, on June 29, A. D. 1915, and on that date Messrs. Luthardt, Markham and Bauder became members of the Police Department.

Section 1 of an act passed by the General Assembly, entitled, "An act to provide for the formation and disbursement of the pension fund in cities, villages and incorporated towns having a population exceeding 100,000 inhabitants for municipal employes," in force July 1, 1911, reads in part as follows:

“* * * Provided, however, that the provisions of this act shall not apply to temporary or probationary employes, nor to those defined as sixty day employes by said act, nor to any employes (employee) who is sixty years or more of age at the time this act is in force and effect, and who at said time has not been in the service of said city, village or town for at least ten years, nor to any employe of such city, village or town *now or hereafter* participating in any other municipal pension fund.”

Clause 6 of Section 4 of said act creating the Municipal Pension Fund of the City of Chicago, in force July 1, 1911, is the only section in said act conferring any power on the Board of Trustees to make refunds, and the said section is as follows:

“To authorize the payment to any employee who may be separated from the service of such city, village or town by the abolishment of his or her position before such employe shall have qualified for a pension, an amount equal to the amount deducted from the salary or wages of such employe. Provided, that such employe shall release said board from all future liability upon receipt of said sum.”

There are now and there have been, since July 1, 1911, three laws on the statute books of the State of Illinois regulating the pensioning of the employes of the city—one law covering the employes of the Police Department, one covering the employes of the Fire Department, and the last one, in force July 1, 1911, covering a vast number of employes of the various other municipal departments outside of the Police Department and Fire Department. In so far as the employes have the right to participate in the respective pension funds, each class of employes, namely, the employes of the Police Department, the employes of the Fire Department, and the employes of the various other municipal departments covered by the Municipal Pension Law of 1911, are separate and distinct departments. The employes of either of the three classes have no right whatsoever to participate in the pension fund of the other. Employes participating in the Municipal Pension Fund under the act of 1911, lose all right to parti-

cipate in said fund if they become connected with either the Police Department or the Fire Department, and as soon as any employe of the city, who may be a contributor to the Municipal Pension Fund, becomes connected with either the Police Department or the Fire Department, said employe, under Section 1 of the Act of July 1, 1911, is automatically removed from participating in the said Municipal Pension Fund; and his position, in so far as the Municipal Pension Fund is concerned, is abolished as soon as he connects himself with either the Police Department or the Fire Department.

Statutes, such as the one creating the Municipal Pension Fund of Chicago, are remedial in character and under our law are to be liberally construed so that the intent of the General Assembly may be made effective and operative. In order to gather the full meaning and intent of the General Assembly, it is our opinion that Section 6 of the Act of July 1, 1911, should be read and considered together with Section 1 of said act. Section 1 of said act having provided that the provisions of the act should not apply to any one *now* or *hereafter* participating in any other pension fund.

We are of the opinion that the ordinance passed on March 30, 1915, designating Mr. Cregier the city custodian and making him a member of the Police Department, and the ordinance passed June 28, 1915, and in force and effect June 29, 1915, designating the secretary to the general superintendent of police, the head clerk and drill master in the Police Department "policemen," automatically abolished the positions they formerly held, the holding of which entitled them to participate in the Municipal Pension Fund. All four of the above named are now compelled, by law, to contribute monthly to the Police Pension Fund of this city, and an examination of the statutes shows clearly that it was never the intention of the Legislature that any employe should contribute to or be a participant in more than one pension fund.

We therefore beg to advise your board that you possess the necessary power to order a refund of the amounts con-

tributed to the municipal fund by Messrs, Luthardt, Markham, Bauder and Cregier.

Respectfully submitted,

JAMES W. BREEN,
Assistant Corporation Counsel.

Approved:

CHARLES M. HAFT,
Acting Corporation Counsel.

Federal Control of the Chicago Harbor.

August 16, 1915.

HON. ROBERT M. BUCK, Alderman Thirty-third Ward.

Dear Sir:

In response to your inquiry of August 14th, I advise you that by virtue of the provision of the Federal constitution, giving to Congress jurisdiction over interstate commerce, the Supreme Court of the United States has held that whenever a stream or body of water was so situated that the commerce of one state could be so moved thereon, either directly or in connection with some other stream or body of water, that said commerce could be transported entirely by water to another state; that jurisdiction over all said navigable waters was vested in the Congress of the United States, and as a corollary, all commerce upon said waters was likewise under the jurisdiction of the United States.

The jurisdiction above referred to has been held to be paramount and at the will of Congress practically exclusive. On the contrary it has been held that where jurisdiction as to a particular subject has not been exercised by Congress, then such jurisdiction may be exercised by the respective states or by any auxiliary governing body of the state authorized in that behalf so to do, and that such state legislation would endure until Congress should see fit to act on the particular subject. This subject received the consideration of the Supreme Court of the United States in *Smith v. Alabama*, 124 U. S. 465, wherein the court, at page 473, says:

“The grant of power to Congress in the constitution to regulate commerce with foreign nations and among the several states, it is conceded, is paramount over all legislative powers which, in consequence of not having been granted to Congress, are reserved to the states. It follows that any legislation of a state, although in pursuance of an acknowledged power reserved to it, which conflicts with the actual exercise of the power of Congress over the subject of commerce, must give way before the supremacy of the national authority. * * *

“There are many cases, however, where the acknowledged powers of a state may be exerted and applied in such a manner as to affect foreign or interstate commerce without being intended to operate as commercial regulations. * * *”

In *Gilman v. Philadelphia*, 70 U. S. 713, the Supreme Court of the United States had occasion to treat of the relative jurisdiction of the Federal and state governments with reference to the regulation of navigable waters and the commerce upon such waters, and at page 724 the court says:

“Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a state other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress. This necessarily includes the power to keep them open and free from any obstruction to their navigation, interposed by the states or otherwise; to remove such obstructions when they exist; and to provide by such sanctions as they may deem proper, against the recurrence of the evil and for the punishment of offenders. For these purposes, Congress possesses all the powers which existed in the states before the adoption of the national constitution, and which have always existed in the Parliament of England. It is for Congress to determine when its full power shall be brought into activity, and as to the regulations and sanctions which shall be provided. * * *

“We will now turn our attention to the rights and powers of the states which are to be considered.

“The national government possesses no powers but such as have been delegated to it. The states have all but such as they have surrendered. The power to authorize

the building of bridges is not to be found in the Federal constitution. It has not been taken from the states. It must reside somewhere. They had it before the constitution was adopted, and they have it still. * * *

Notwithstanding the conceded paramount authority of Congress over navigable waters and the commerce thereon, there seems to be a clear line of demarcation between the regulation of commerce on the one hand and state legislation, the tendency of which is primarily to provide for the health, life and safety of the citizenship of the city, although such regulations in a degree regulate or even impede interstate commerce. In *Smith v. Alabama*, 124 U. S. 465, the Supreme Court of the United States quotes briefly from *Sherlock v. Alling*, 93 U. S. 99, and at page 474 of that opinion, says:

“ ‘In conferring upon Congress the regulation of commerce, it was never intended to cut the states off from legislating on all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce, and persons engaged in it without constituting a regulation of it within the meaning of the constitution. * * * And it may be said generally, that the legislation of a state, not directed against commerce or any of its regulations, but relating to the rights, duties and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit.’ ”

Thus in *Hennington v. Georgia*, 163 U. S. 299, a statutory regulation enacted by the State of Georgia prohibiting the operation of freight trains on the Sabbath day was held to be an enactment within the jurisdiction of the Legislature of Georgia, notwithstanding the fact that incidentally the effect thereof was to bring all interstate freight commerce upon railroads to a standstill during the entire Sabbath day.

In *Escanaba Company v. Chicago*, 107 U. S. 678, the Supreme Court of the United States had before it an ordinance closing the Chicago River absolutely to traffic thereon

during certain hours of the day when bridge traffic was the heaviest. Notwithstanding the fact that this ordinance was a serious impediment to navigation on the river, the Supreme Court held that it was valid.

As distinguished from the cases to which your attention has been invited there are numerous decisions holding that the legitimate purposes of the various regulations considered were not so much to protect life, safety and health as to interfere with the legitimate conduct of interstate commerce, and in those cases the Supreme Court has not hesitated to brand the particular regulations invalid.

The difficulty is not to state the rule, but rather to apply the well established rule to the particular circumstances of the individual case.

Congress has enacted, by an act entitled "Regulations of Steam Vessels," Title 52, Section 4399-4500 of the Revised Statutes of the United States, and acts secondary thereto, laws relating to steam vessels. I have carefully examined these provisions and find nothing therein contained which gives the right to any person to dismantle and junk any vessel which is found unfit for passenger-carrying service.

The matter of preventing unseaworthy vessels from navigating the high seas, Great Lakes, etc., is contemplated in the following provisions of the act:

Section 4400 of the Revised Statutes provides that all steam vessels navigating any waters of the United States which are common highways of commerce shall be subject to the provisions of this title;

Sections 4417-4418 provide that the local inspectors shall once in every year, at least, carefully inspect the hull, boilers and equipment of each steam vessel within their respective districts and shall satisfy themselves that every such vessel so submitted to their inspection is of a structure suitable for the service in which she is to be employed, has suitable accommodations for passengers and the crew, and is in a condition to warrant the belief that she may be used in navigation as a steamer with safety to life, etc.;

Section 4422 provides that the inspectors shall issue

certificates for vessels that have been carefully examined and approved, and further prohibits any vessels from being navigated without having been carefully examined and having on board a regular certificate of inspection;

Section 4453 provides that, in addition to the annual inspection, the local inspectors shall examine at proper times steamers arriving and departing to and from their respective ports, so as to enable them to detect any neglect to comply with the requirements of the law and also any defects and imperfections becoming apparent after inspection tending to render navigation of the vessels unsafe, and it further provides that the inspector may revoke the licenses previously issued and refuse to issue a new license until the vessels shall have passed a satisfactory reinspection;

Section 4463 provides that any vessel of the United States subject to the provisions of this title shall not be navigated unless she shall have in her service and on her board such complements of licensed officers and crew as may in the judgment of the local inspectors be necessary for her safe navigation.

Thus it may be seen that Congress evidently felt that under these provisions proper safeguards had been made, and if properly executed there would be no possibility of an unsafe and unseaworthy vessel being permitted to navigate the waters of the United States.

In view of these Federal enactments I consider it very questionable if either state or municipal legislation of the nature suggested in your letter would be valid. It seems to me that if the Federal regulations above referred to were enforced with a fair degree of rigidity, the purpose desired by you as expressed in your communication would be fully accomplished. In other words, it seems that the real question is not so much one of legislation but rather one of enforcing legislation.

The principle of forfeiture to the state because of loss of life by the capsizing of a boat is not in force in the United States. The nearest approach to anything of the kind is the libeling of a boat under the admiralty practice or the

seizing of a boat on attachment under the Water Craft Attachment Act of this state, but neither of these proceedings are tantamount to the forfeiture of which you speak in your letter.

Very truly yours,
 CHARLES M. HAFT,
Acting Corporation Counsel.

Operation of Trip-Hammers During the Night.

August 19, 1915.

HON. ROBERT M. BUCK, Alderman, Thirty-third Ward.

Dear Sir:

You referred to this department a complaint of the residents of the Thirty-third Ward against the operation of trip-hammers throughout the night at the works of the Union Drop Forge Company, 1746 North Kostner avenue, with an inquiry as to whether this noise can be stopped as a nuisance or in any other way.

By act of the Legislature (Chap. 24, Par. 62, Clause 75, Hurd's Revised Statutes), the City Council may declare and define nuisances, and in pursuance of the authority thus vested, the City Council has enacted a general ordinance declaring and defining nuisances. By Section 1429 of The Chicago Code of 1911, the City Council has provided that in addition to such things as are defined as nuisances those offenses which are known to the common law of the land and the statutes of Illinois as nuisances may also be proceeded against by the municipality.

There is no ordinance now in force which in any way limits the hours during which trip-hammers may be operated, and the general ordinance declaring and defining nuisances does not include noise caused by the operation of trip-hammers in a forge. Aside from noise resulting from explosions, there are few attendant upon any lawful pursuit that are of such a nature that city officials can suppress them without express enactment, and it is our opinion that it would be an

unlawful exercise of discretion for a city official to suppress the lawful operation of a forge during certain hours of the night without specific provision therefor in an ordinance.

The only other question to be determined is whether the annoyance complained of is a public nuisance under the common law. The Supreme Court of this state in the cases of *Earp v. Lee*, 71 Ill. 193, and the *City of Chicago v. Shaynin*, 258 Ill. 69, in defining a common nuisance has adopted the view set forth by Hawkins in his *Pleas of the Crown*, Vol. 1, p. 336, which is as follows:

“A common nuisance is an offense against the public, by doing anything injurious to all the King’s subjects, or by omitting to do that which the common good requires. It follows that private annoyances are not the subject of public prosecution, but of a private action.”

In so far as the facts are explained in your letter, we are of the opinion that the noise created by the operation of trip-hammers during the night does not fall within the scope of a public nuisance at common law and is not a statutory nuisance.

The City Council, under legislative authority to declare what shall be a nuisance and to abate the same (Chap. 24, Par. 62, Clause 75, Murd’s Revised Statutes), has found it expedient to enact ordinances regulating certain lawful pursuits, as for instance crying of wares, transporting of rails, playing of hand organs etc., and likewise it is our opinion that it would be a proper assumption of authority for the City Council to pass an appropriate ordinance to suppress the operation of trip-hammers during certain hours of the night.

However, the only existing redress of the parties aggrieved, as indicated by the opinion of the Supreme Court of this state, is a private action against the parties responsible for the annoyance.

Yours very truly,
WALTER P. STEFFEN,
Assistant Corporation Counsel.

Approved:

CHARLES M. HAFT,
Acting Corporation Counsel.

Ordinance Concerning Skylights not Retroactive.

August 19, 1915.

HON. CHARLES BOSTROM, Commissioner of Buildings, Chicago.
Dear Sir:

Your inquiry of the 13th, in reference to the proper interpretation of paragraph (c) of Section 593 of The Chicago Code of 1911 and its application to skylights now in existence, has been referred to me for answer.

The provisions in paragraph (c) of Section 593 of The Chicago Code of 1911, to be given their proper construction, must be read in conjunction with the whole of Section 593, which reads as follows:

“593. Skylights—construction of—glass in.) (a) Any skylight on the roof of any building less than ninety feet in height, other than a frame building, shall have the sides, sashes and frames constructed of metal, or of wood metal-clad on all exterior surfaces. Any skylight on a building more than ninety feet in height shall be entirely of incombustible material.

“(b) Every skylight shall be provided with ventilation opening of an area of at least three per cent of the base area of the skylight.

“(c) The glass in all such skylights, except in buildings in Classes III and VI, not exceeding three stories in height, shall have at least six inches over same a strong wire netting with wire not lighter than No. 12, galvanized after weaving, and mesh not coarser than one by one inch, unless the glass contains a wire netting within itself. Supports for screen shall not be less in size than the bars supported, and of the same material.”

The main question or controversy to be determined in this matter is whether Section 593 was intended to be retroactive, and, if so, if the language employed is sufficient to give it that effect.

I do not believe that this section can be construed as affecting skylights on existing buildings and be retroactive in effect, but that it only applies to buildings hereafter erected, for the reason that in construing ordinances a retroactive

effect will not be given unless it clearly appears that such has been intended.

Russell et al. v. Benson et al., 125 Ill. 490.

In addition to this authority, paragraph (a) of Section 514 of The Chicago Code of 1911 provides:

“In construing the several sections of this chapter, said sections shall not be construed as requiring alterations in the construction or equipment of buildings or structures in existence at the time of the passage of this chapter, except where specifically provided, unless such buildings shall not have sufficient or adequate means of egress therefrom or ingress thereto, by reason of insufficient or inadequate stairways or stairways improperly located or insufficient or inadequate elevators or elevator equipment, doors, fire escapes, windows or other means of egress or ingress, and except also in sections which are herein made retroactive.”

This section of the code relating to the construction to be given Section 593 and other ordinances relating to buildings will prevent the enforcement of this ordinance so far as existing buildings are concerned, as the requirements in paragraph (c) of Section 593 are included in the terms of Section 514.

Your further contention that this is a protective netting and not within the meaning of Section 514, in that it does not require a change or alteration to be made in the structure or equipment of the building is hardly tenable.

Section 514 covering this proposition is as follows:

“In construing the several sections of this chapter, said sections shall not be construed as *requiring alterations in the construction or equipment of buildings or structures in existence* at the time of the passage of this chapter.”

I think that the use of the word “equipment” in said section is sufficient to cover this latter point.

Yours very truly,

GEORGE A. CURRAN,
Assistant Corporation Counsel.

Approved:

CHARLES M. HAFT,
Acting Corporation Counsel.

Condemnation of Land for Street Purposes.

August 19, 1915.

EDWARD J. GLACKIN, ESQ., Secretary, Board of Local Improvements.

Dear Sir:

We have your letter of inquiry dated July 14, with enclosure of a copy of certain correspondence relating to the proposed condemnation of a strip of land 33 feet in width north of, and adjacent to, East 71st street, from Cottage Grove avenue to Chauncey avenue.

We understand that you desire the opinion of this department with reference to the question whether, assuming it to be true that the Oakwoods Cemetery Association originally did not occupy the strip of land in question, but that within the last twenty years they moved their fence 33 feet south to its present location, the city could now maintain an ejectment suit against the association for the purpose of opening up 71st street at this point to a uniform width of 66 feet.

We are of the opinion that, if the strip of land which is now sought to be condemned was originally a part of the public highway, the city would now have the right to bring an action in ejectment to make the land available for highway purposes, however long the public has been deprived of the use of this strip for such purposes.

The law is well established that the Statute of Limitations does not run against the public in a situation of this kind, and that adverse user of a portion of a street will not bar the right of the public to have possession of the street to its full width restored. (*Village of Lee v. Harris*, 206 Ill. 428; *City of De Kalb v. Luney*, 193 Ill. 185.)

The courts have indeed held that, although the legal right of the public to the exclusive use of a highway cannot be qualified or destroyed by the adverse possession of private parties, nevertheless, in some instances, an equitable estoppel might arise against the public if private parties have been in-

duced, by the acts of those representing the public, in good faith, to believe the street has been abandoned by the public, and also that on the faith of that belief and with the acquiescence of those representing the public such private parties have erected structures on the street, or made improvements thereon of such lasting and valuable character that to permit the public to assert the right to re-possess itself of the premises would entail great pecuniary loss and sacrifice. It is emphasized in these cases, however (*City of De Kalb v. Loney*, 193 Ill. 185, 190), that the mere fact that possession of a portion of a street or highway has been allowed to remain for any period of time in the possession of private parties is not sufficient to create such an estoppel, and, so far as we are advised of the facts in this instance, no basis for the raising of an estoppel appears.

The more difficult question which presents itself here is, whether or not 71st street ever included the strip of land now sought to be condemned. It is our understanding that an investigation has been made by the Board of Local Improvements, and that no records have been discovered indicating that the strip in question was ever a part of the public highway. We may assume, therefore, that the Oakwoods Cemetery Association has never undertaken to appropriate the south 33 feet of their land to public use by the customary method of statutory dedication. If this strip is to be established as part of the highway, it must be either by prescription or common law dedication.

In order to establish a right by prescription, the use and enjoyment of the strip by the public as part of the highway must have continued for twenty years, and have been "adverse, under a claim of right, exclusive, continuous, uninterrupted, and with the knowledge and acquiescence of the owner of the land in and over which the easement is claimed." (*City of Chicago v. Chicago, Rock Island & Pacific Railway Company*, 152 Illinois, 561.) Such a prescriptive right will be confined to the specific line or way, the use of which by the public is such as to satisfy the above requirements. If the assertions of the old residents may be taken as establishing, however, that the fence bordering the cemetery was

originally 33 feet north of the present location, that fact would be a strong circumstance to be taken into consideration by the jury in determining the precise limits or extent of the way to which such prescriptive right would apply.

Town of Bethel v. Pruett, 215 Ill. 162, 169.

On the other hand, in order to establish that the strip in question is part of 71st street by common law dedication, it is essential that there should have been an intention on the part of the Oakwoods Cemetery Association to donate the same to public use, and an acceptance thereof by the public.

In the case of *City of Chicago v. C. R. I. & P. Ry. Co.*, above referred to, the court said:

“In order to constitute a dedication at common law, it is essential (1) that an intention on the part of the proprietor of the land to donate the same to the public use, and (2) an acceptance thereof by the public, be established by the evidence; and (3) that the proof as to these facts must be clear, satisfactory and unequivocal. The vital and controlling principle is the *animus donandi*, and whenever this is plainly and unequivocally manifested on the part of the owner of the soil, either by formal declaration or by acts from which it may fairly be presumed, such as should equitably estop him from denying such intention, the dedication, so far as the owner is concerned, is complete.”

If it is true that the Oakwoods Cemetery Association originally constructed its fence 33 feet north of the southern boundary of the property, that fact would undoubtedly be evidence to be considered by the jury in determining whether the strip was thus dedicated, but it would not be conclusive evidence of such dedication. To be confident of establishing the right of the public in the strip by this method it would be necessary to have clear and unequivocal evidence showing an intention on the part of the association to appropriate it for highway purposes.

Very truly yours,

RALPH G. CRANDALL,
Assistant Corporation Counsel.

Approved:

CHARLES M. HAFT,
Acting Corporation Counsel.

Aldine Square a Public Park.

August 24, 1915.

HON. WILLIAM G. KEITH, Commissioner, Department of Gas and Electricity.

Dear Sir:

Replying to yours of August 14th, with reference to the status of Aldine Square, we desire to state that in Book 10 of Plats, page 22, recorded April 26, 1875, of the subdivision wherein Aldine Square is located, the map shows a *public drive*, thirty feet in width, noted thereon, with an entrance thereto from Vincennes avenue thirty feet wide, and a twenty-foot entrance to the alley north of East 38th street. Said public drive surrounds a plot of ground in the center of Aldine Square, 193—25 feet by 250 feet, on which is noted the word "*Public*." There are also two small plots of ground in the Southeast and Northeast corners of said square and abutting said thirty-foot public drive on the west and Vincennes avenue on the east, marked "*Public*," also a small plot of ground, marked "*Public*" on the Northwest corner of said square and abutting the lot lines on the north and west sides of said square and said thirty-foot public drive. A lot line of said subdivision faces said thirty-foot public drive on the north, south and west, and the building line is twenty feet from said public drive.

Section 1704 of the City Code of 1911, in an ordinance in reference to municipal parks, playgrounds and bathing beaches (passed in pursuance of a resolution passed by the City Council on the 6th of November, 1899, and amended on the 27th of November, 1899), provides:

"The special park commission shall have jurisdiction over all city parks, public squares and triangles, and other open spaces at street intersections, including the following (mentioning with other parks, etc.):

"Aldine square—Vincennes avenue, East Thirty-seventh place and alley north of East Thirty-eighth street."

We are therefore of the opinion that Aldine Square has been legally dedicated and accepted by the City of Chicago, and the street within Aldine Square is a city street, and that Aldine Square is under the jurisdiction of the Special Park Commission.

Yours very truly,

BENTON F. KLEEMAN,
Assistant Corporation Counsel.

Approved:

CHARLES M. HAFT,
Acting Corporation Counsel.

Giving Away of Free Tickets Entitling Holder to Chance Prize Distribution.

August 27, 1915.

HON. CHARLES C. HEALEY, General Superintendent of Police.

Dear Sir:

In your letter of August 18, 1915, you call our attention to the method adopted by the North American Restaurant Company in giving out tickets to customers and other persons, entitling them to a chance to win prizes.

You state in your letter that you have learned through investigation that free tickets are given to all ladies and gentlemen entering or leaving the place of business of the North American Restaurant Company on Wednesdays and Fridays, and that on Tuesdays and Thursdays, free tickets are given only to ladies. We are advised that this is done irrespective of whether or not the persons to whom the tickets are given actually make any purchases in the premises.

In our opinion the fact that the giving of free tickets to all persons entering or leaving the establishment is confined to certain days of the week, and the fact that on certain days the giving of free tickets is confined to ladies only, does not alter the legal aspect of the matter.

The facts as you present them are similar to the facts in the opinion of Mr. Hornstein with reference to the Wash-

ington Shirt Company. (P. 625, Opinions Corporation Counsel from April 1, 1911, to December 31, 1912.)

The North American Restaurant matter differs only from the foregoing case in that the distribution of free tickets is confined to certain days of the week for all ladies and gentlemen and certain other days for ladies only.

We are of the opinion that the giving of free tickets, as above set forth, does not constitute a lottery for the reason that the element of consideration is lacking.

The following cases are also in point:

Cross, et al. v. People, 32 Pac. 821.

Yellow-Stone Kit v. State, 7 So. Rep. 338.

Such distribution of free tickets, if carried out in the manner stated, is not contrary to law.

Yours very truly,

ROY S. GASKILL,
Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,
Corporation Counsel.

Erection of Telegraph Poles in Territory Formerly belonging to Evanston.

August 27, 1915.

MR. J. M. WILLIARD, Right-of-way Agent, Public Service Company of Northern Illinois, Chicago.

Dear Sir:

On July 30th you have submitted to this office application by the Public Service Company of Northern Illinois for privilege to erect telegraph poles in that territory heretofore a part of the City of Evanston and described, as follows:

“All that part of the City of Evanston, County of Cook, State of Illinois, lying east of the east line of the original right-of-way of the Chicago, Evanston and Lake Superior Railway Company and south of the south boundary line of Calvary Cemetery and said south boundary

line produced east to the east boundary line of said City of Evanston.”

This territory has recently been annexed to the City of Chicago and is now a part thereof. (See C. J. February 8, 1915, pp. 3367-3369 and Opinion of Corporation Counsel, February 15, 1915, C. J. of February 19, 1915, pp. 3640-3641.)

A certified copy of said ordinance and a map were recorded May 5, 1915, in the office of the Recorder of Deeds as Document No. 5,627,242.

With your communication you submitted to this department for consideration the following papers:

1. A certified copy of an ordinance granting the Evanston Electric Illuminating Company the right to construct and maintain an electric light heating and power plant in the City of Evanston.

2. An ordinance amending Section 13 of an ordinance passed July 9, 1895, passed April 28, 1903, and approved April 28, 1903.

3. Assignment of the rights under said ordinance by the Evanston Electric Illuminating Company to the North Shore Electric Company, dated June 22, 1903.

4. Reassignment of the rights under said ordinance by the North Shore Electric Company to the Public Service Company of Northern Illinois, dated November 11, 1911.

The ordinance above referred to, as shown by a certified copy thereof submitted to me, granted to the Evanston Electric Illuminating Company the right to construct and maintain an electric light heating and power plant in the City of Evanston for a term of twenty-five (25) years from and after passage of said ordinance.

“With the right-of-way along, upon and under all alleys in said city, and in all places in said city where the public or private service required from said illuminating company cannot be adequately rendered through such alleys, then, over, across and under all avenues, streets and public places within said city, the necessity of the use of said avenues, streets and public places to be determined by the commissioner of public works of said city, except in the case of paved streets and improved parks, the necessity of the use of which by said illum-

inating company shall be determined by the City Council of said city, meaning and intending hereby to extend the rights, privileges and franchises heretofore granted to said company by virtue of an ordinance granting the Evanston Electric Illuminating Company the right to construct and maintain an electric light, heat and power plant in the Village of Evanston adopted by the Board of Trustees of the village, now City of Evanston, February 21, 1890, for the purpose of placing, operating and maintaining and replacing one or more lines of wire or other conductors or conduits, and all necessary feeders, service pipes, service wires, conductors or conduits in connection therewith, to be used for the purpose of electric lighting, heating or motor power, so that this ordinance shall be in force throughout the entire territory of the City of Evanston."

The ordinance further provides for the giving of bonds and the acceptance of the ordinance by the Evanston Electric Illuminating Company within the time specified in said ordinance. The said company under date of July 17, 1895, duly accepted said ordinance, as appears from a certified copy of a letter of said acceptance submitted to me.

It also appears that the original ordinance did not provide for an assignment thereof. By virtue of an ordinance passed April 28, 1903 and approved April 28, 1903 (a certified copy of which has been submitted to me), it is provided that the rights granted under the original ordinance "shall extend to the successors and assigns of said grantee mediate or immediate."

The ordinance first above mentioned has many conditions, which I do not pass upon in this opinion nor do I attempt in this opinion to construe in any way the provisions as binding upon the company or the City of Chicago, except to determine the question of permits for placing poles on streets in so much of said annexed territory as belongs to the City of Chicago.

I have examined the certified copy of the ordinance and I find from the certificate of the city clerk of the City of Evanston, that said ordinance was duly passed by the City Council of the said City of Evanston on the 9th day of July

A. D. 1895 and that the same was signed and approved by the mayor of said city on the 9th day of July, A. D. 1895.

It is, therefore, my opinion, that said ordinance having been lawfully passed, the said Evanston Electric Illuminating Company heretofore has had the right to maintain and erect poles for the purposes and under the conditions mentioned in said ordinance in the territory above referred to, and since this department has held that said territory has been properly annexed to Chicago, I find no objections to an issuance of requested permits on the part of the City of Chicago to said Evanston Electric Illuminating Company for such purposes.

I have examined the assignment submitted to me from the Evanston Electric Illuminating Company to the North Shore Electric Company and find from such examination that the Evanston Electric Illuminating Company on the 22d day of June, A. D. 1903, transferred "all rights, privileges and benefits granted to said Evanston Electric Illuminating Company to the North Shore Electric Company. I have likewise examined the reassignment of the ordinance from the North Shore Electric Company to the Public Service Company of Northern Illinois, and I find under said assignment dated November 11, 1911, the said North Shore Electric Company, by Frank J. Baker, Vice President and E. D. Alexander, Assistant Secretary, transferred to the Public Service Company of Northern Illinois, its successors and assigns, all rights, benefits and privileges and advantages granted and conferred by the said ordinance and acquired by the said North Shore Electric Company, to the said Public Service Company of Northern Illinois.

Although I have not examined the by-laws or the proceedings of the Board of Directors of said North Shore Electric Company or the Evanston Electric Illuminating Company, I believe for the purposes of this opinion that said transfers are sufficient to vest in said Public Service Company of Northern Illinois all the rights obtained by the said Evanston Electric Illuminating Company under said franchise. (See Vol. 6, Opinions of Corporation Counsel, pp. 1022-1025.)

In conclusion, I wish to say that from the examination of these various papers, I am of the opinion that there are no legal objections to granting said Public Service Company of Northern Illinois permits to erect poles on, upon, along and across streets, alleys and places mentioned in said ordinance in that former territory of the City of Evanston above described now annexed to the City of Chicago; provided that the said poles do not go upon other territory in Chicago; and provided further that said permits shall in all respects comply with the ordinances of the City of Chicago, relating to the granting of such permits and to the conditions mentioned in aforesaid franchise ordinances of the City of Evanston.

I return herewith all papers left with me for inspection.

Yours very truly,

LOUIS SALINGER,

Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,

Corporation Counsel.

Lighting of Sheridan Road in Territory Annexed at North End of City.

August 30, 1915.

WILLIAM G. KEITH, Esq., Commissioner of Gas and
Electricity.

Dear Sir:

In reply of yours of August 19th, asking for an opinion as to whether or not Sheridan road between Howard street and Calvary is under the jurisdiction of the city and whether or not the city is obliged to light same, I desire to say that under an ordinance passed by the City Council on February 8, 1915, the following territory known and described as

“All that part of the City of Evanston, County of Cook, State of Illinois, lying East of the East line of the original right-of-way of the Chicago, Evanston and Lake Superior Railway Company and South of the

South boundary line of Calvary Cemetery and said South boundary line produced East to the East boundary line of said City of Evanston”

has been annexed to and made a part of the City of Chicago.

Under the law the annexation became effective as of the date of passage, the mayor having signed the annexation ordinance immediately after it was passed, and a certified copy of said ordinance with an accurate map of the territory, was filed for record by the city clerk on May 6, 1915, in the office of the Recorder of Deeds of Cook County. The map shows that Sheridan road between Howard street and Calvary is located in the annexed territory, and the same is to all intents and purposes under the jurisdiction of the City of Chicago and the city should provide for the lighting of same.

In the laws of 1913 of the State of Illinois enacted by the General Assembly, there appears “An Act to enable the Commissioners of Lincoln Park to take, regulate, control, improve, locate, extend, diminish, widen, straighten and otherwise deal with the public street or boulevard known and to be known as Sheridan road now under the control of incorporated cities, towns, villages, park districts, townships and counties which lead from Lincoln Park, a public park in the City of Chicago, to the northern boundary of the State of Illinois, and to provide for the power of eminent domain to carry out the authority herein granted and to provide the method of securing funds for the improvement and maintenance of said road.”

Said act provides for said commissioners to take over any portion of Sheridan road after first having obtained the consent in writing of the owners of a majority of the frontage of the lots and lands abutting on said Sheridan road in each municipality or park district, or in that portion of each township not within any city or village, and also the consent expressed by resolution or otherwise of the authorities of each municipality.

I am informed by Mr. Francis O'Shaughnessy, attorney for the Lincoln Park Board, that no action had been taken

by the board to take over Sheridan road between Howard street and Calvary, now under the jurisdiction of the City of Chicago.

Yours respectfully,

BENTON F. KLEEMAN,
Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,
Corporation Counsel.

Status of City Employee Who Had Previously Been Convicted of Crime.

August 31, 1915.

HON. W. R. MOORHOUSE, Commissioner of Public Works.

Dear Sir:

We are in receipt of your favor of August 17th asking as to the status of an employe of the City of Chicago who had been previously convicted of crime and has served time in the penitentiary.

We gather from enclosures sent us with this communication that your inquiry has reference to an assistant foreman of the Water Pipe Extension Division who, it seems, was convicted of crime and has served time in the penitentiary.

We observed from a memorandum from the Civil Service Commission to Mr. Burkhart, Deputy Commissioner of Public Works, that the employe in question was originally appointed foreman of the Water Pipe Extension Division December 15, 1906, and afterwards was appointed water inspector, May 6, 1908. His application for assistant foreman was filed November 14, 1906. He acknowledged having been convicted of crime in 1904, and stated that he was pardoned by Governor Altgeld. (We presume they mean to say he was pardoned by Governor Altgeld in 1894 instead of 1904 because Governor Altgeld's term expired in January of 1897.)

Section 5 of Rule 7 of the rules of the Civil Service Commission of Chicago covering the question of separation of employes from the classified service of the city, provides in part as follows:

"Sec. 5. CAUSES FOR REMOVAL AND DISCHARGE. Any member of the classified civil service of the City of Chicago who shall be guilty of any one or more of the following offenses, shall be subject to removal or discharge from the service, provided, however, that nothing in this section contained shall be held to prevent removal upon charges based upon any other act or offense not specifically set forth herein:

* * * * *

"(k) Any criminal act; but if any such act is, at the time charges are pending before the commission, then subject to criminal proceedings, the officer or employe so charged shall be entitled, at his request, to a continuance of the hearing, under suspension, for a period of not to exceed thirty days. * * *

"(1) Any felony or misdemeanor involving moral turpitude, in which a conviction has been secured."

The above rule is the only rule of the Civil Service Commission that in any way affects the case now under consideration.

Section 6 of the Act of 1895 regulating civil service of cities, reads in part as follows:

"Applicants for offices or places in said classified service—* * * shall be subjected to examination, which shall be public, competitive and free to all citizens of the United States with specified limitations as to residence, age, health, habits and moral character."

In June, 1904, a petition was filed in the Supreme Court of Illinois to disbar a member of the legal profession on the ground that prior to his admission to the bar of this state he had been convicted of crime in the State of Indiana and was sentenced to the penitentiary and served time. In his answer to the petition he admitted the truth of the charge and upon his admission to the truth of said charge a motion was made by the relator to make the rule absolute. The Supreme Court of this state denied the motion and in its opinion said:

“We are not disposed to adopt that view in this case. Thirteen years had elapsed between the time of the conviction and the time of the application of admission to this bar and to hold as an abstract proposition of law that an error once made is to forever damn the man who makes it, is a thing we are not disposed to do. The opportunity and the hope held out to all men to repent and correct their ways, if they have ever been wrong, are the only possible incentives that the law can give that can work the reformation of men who have gone wrong. We are unable to say as a matter of law, that this man may not have repented and may not have been a good citizen, although he may have been guilty as charged in the Indiana court under which he was convicted.” (210 Ill. Supreme Court Proceedings.)

After a careful consideration of the Civil Service Act and Section 5 of the Civil Service Rules, it is our opinion that Section 5 of the Civil Service Rules, referring to causes for removal and discharge, shall and must be construed so that the meaning and effect of it would be to refer to offenses committed while the offender was a member of the classified service and should not be stretched to reach offenses committed years prior to the offender's entering the classified service of the city.

In reference to the assistant foreman referred to in your enclosures, it appears, from the memorandum of the Civil Service Commission, that he was pardoned by Governor Altgeld, and if that fact be true, the pardon granted him automatically wiped out his conviction and placed him in the same position he was in society prior to said conviction.

“The effect of a pardon subsequent to the conviction is to make the offender a new man, and to acquit him of all penalties and forfeitures. *Cook v. reeholders of Middlesex*, 26 N. J. Law (2 Dutch) 326.

“A pardon reaches both the punishment prescribed for the offense and the guilt of the offender. It obliterates, in legal contemplation, the offense itself. In contemplation of law, it so far blots out the offense that afterwards it cannot be imputed to the offender to prevent the assertion of his legal rights. It gives him a new credit and capacity, and rehabilitates him, to that

extent, in his former position. *Knapp v. Thomas*, 39 Ohio St. 377, 395, 48 Am. Rep. 462.

“‘A pardon, in its nature, is wholly exculpatory of the convict’s criminality, remits the punishment, and, as it were, renews the man, and rehabilitates him in the garb of innocence.’ *Young v. Young*, 61 Tex. 191, 193.

“‘A pardon is an act of mercy flowing from the fountain of bounty and grace. Its effect, when it is a full pardon, is to obliterate every stain, which the law attached to the offender; to place him where he stood before he committed the pardoned offense, and to free him from the penalties and forfeitures to which the law had subjected his person and property; * * * ‘to acquit him of all corporal penalties and forfeitures annexed to the offense for which he obtains his pardon.’ *United States v. Athens Armory*, 35 Ga. 344, 362, 24 Fed. Cas. 878, 884.”

We are of the opinion that the Supreme Court of Illinois in the case in 210 Ill. correctly defines the status of a man who has been convicted of crime and served time in the penitentiary. The mere fact that a man may have once erred and been convicted of crime should not forever bar him from public or private employment. The legislature of the State of Illinois creating the Civil Service Commission gave them power to make rules covering the classification of men who apply for admission to take the competitive examinations for public employment with specified limitations as to residence, age, health, habits and moral character, and we do not think that the Civil Service Commission possesses the right to pass any rules disqualifying any citizen of this state from taking an examination for a position in the classified service by reason of that person having at one time been convicted of crime.

Section 480 of the Act of 1895 passed by the General Assembly provided that any person that should be convicted of violating any of the provisions of the Civil Service Law should be disqualified from holding any office or post of public employment for the period of five years from the date of said conviction, and the Supreme Court, in the case of *People v. Kipley*, 171 Ill. 73, declared said section unconstitutional.

Under our law offenders can be punished only once for an offense, and when once convicted and sentenced, upon having served their time, they have paid the penalty for having offended. To hold that after they have once paid the penalty, an additional punishment, such as disqualifying them from seeking employment, could be perpetually imposed upon them, would be cruel and inhuman.

The fact that they have been permitted to take an examination is *prima facie* evidence that they have been restored to citizenship either by pardon or executive clemency after having served their sentence. If they pass the examination and enter the public service and remain in the employ of the city a considerable length of time, like the assistant foreman of the Water Pipe Extension Division whose case is now under consideration, and conduct themselves during their employment as upright citizens, it is convincing proof that they are men of good moral character. The mere fact that previous to their employment with the city they have committed an offense is no reason why they should be removed from service solely on the ground of that conviction.

We beg to advise you that the status of such employes is just the same as the status of any other employe of the classified service. The unfortunate fact of their conviction and the fact that they served their sentence either entirely or until pardoned should not in itself destroy their rights as members of the classified service.

Very truly yours,

JAMES W. BREEN,

Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,

Corporation Counsel.

Transfers of Certificates of Registration as Electricians.

August 31, 1915.

HON. W. G. KEITH, Commissioner of Gas and Electricity.

Dear Sir:

The communication of your department asking to be advised of the authority to, and the right of, transfer of

certificates of registration issued in accord with the provisions of Sections 831 and 831½ of The Chicago Code of 1911, as amended, has been referred to me.

The holders of certificates of registration issued as provided for in Section 831, as amended, and 831½, as adopted on July 7, 1913, of The Chicago Code of 1911, are the only persons or corporations to whom permits are issued for the installation of wires or other apparatus for the use of electric currents in lighting, heating or power purposes, or the doing of any electrical construction work of any kind whatever, either installing new electrical apparatus or repairing apparatus already in use in the City of Chicago.

Said amended sections also provide that the certificate of registration shall issue for a period of one year, other requirements provided therein being complied with by the applicant, upon the payment of a yearly fee and shall be renewed thereafter upon the payment of an annual fee.

Such certificate of registration is, therefore, a license to engage in such business in the City of Chicago.

Chapter XLI of The Chicago Code of 1911 is a regulation of licenses issued by the City of Chicago, and Section 1520 of said chapter provides for the manner of assignment and transfer of licenses issued by the City of Chicago, except such as are issued for the keeping of a saloon, dramshop, auctioneer's or runner's license, and is as follows:

"1520. TRANSFER OF LICENSE.) No license granted under this ordinance shall be assigned or transferred, except as hereinafter provided, nor shall any such license authorize any person to do business or act under it but the person named therein. Any person to whom any license shall have been issued may, with the permission of the mayor, assign and transfer the same to any other person, and the person to whom such license is issued or the assignee of such license shall surrender such assigned license and have a new license issued for the unexpired term of the old license authorizing the assignee or transferee of such license to carry on the same business or occupation at such place as may be named in such new license; provided, that in all cases the person obtaining such new license shall give a bond with sureties which shall conform as near as may be to the bond upon

which such surrendered license was issued; provided, further, that nothing herein contained shall be held to authorize the assignment or transfer of saloon, dram-shop, auctioneer's or runner's licenses; such licenses shall be non-assignable and non-transferable."

I am of the opinion, therefore, that a certificate of registration issued under the provisions in Section 831, as amended, and Section 831½, as adopted July 7, 1913, is transferable upon the surrender thereof and upon the assignee or transferee filing an affidavit meeting the requirements of the provisions of said section of The Chicago Code of 1911.

Yours very truly,

JAMES DONAHOE,
Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,
Corporation Counsel.

Booking of Prisoner for Practice of Prostitution, Etc.

September 2, 1915.

HON. CHAS. C. HEALEY, General Superintendent of Police.

Dear Sir:

We have your communication concerning "booking" of persons who come under a recent amendment to the Criminal Code of Illinois, commonly known as the "Kate Adams Bill."

The bill is as follows:

"Section 57a-I. Whoever is an inmate of a house of ill-fame or assignation, or place for the practice of fornication or prostitution or lewdness, or who shall solicit to prostitution in any street, alley, park or other place in any city, village or incorporated town in this state, shall be fined not exceeding two hundred dollars, or imprisoned in the county jail or House of Correction for a period of not more than one (1) year, or both." The passage of this law does not repeal or annul the

present city ordinances, so that the situation now is that both the city ordinances and the new law are in full force and effect, and the city may exercise its discretion as to which it will proceed under.

In deciding what course to pursue, we call your attention to the following: In prosecutions under the ordinances of the City of Chicago, which has been the procedure up to this time, a defendant may readily obtain bond either by securing the services of a professional bondsman or by depositing \$25.00 in cash. The desk sergeant has been authorized by law to accept bonds for violation of the city ordinances, and the presence of a municipal judge is not necessary. For these reasons practically all the persons arrested for crimes of this nature have been able to secure liberty by the giving of a bond.

Under the Kate Adams Bill there will be an inability in most cases to secure bonds. The desk sergeant is not authorized to accept bonds in such cases, since they come under the state law. The professional bondsman will decline to sign the bonds except in rare instances because the penalty of the bond will be about \$800.00 and because the bond, unlike a city bond, requires the personal appearance in court of the defendant. Furthermore, the approval of the bond by the municipal judge is necessary before it is effective.

We point out also that procedure under the new bill will be entirely under the control of the state's attorney, whereas under the present procedure the city law department is in charge.

The "Kate Adams Bill" was aimed to correct the practice of fining in dealing with a certain character of offenders, as it had come to be understood that fining was in a measure licensing. The bill was passed by the legislature at the request of the City Council of the City of Chicago and of many organizations. The law was drafted by this department, and a member of this department attended the meetings in Springfield to urge its passage. Thus, official support was given Miss Adams in her successful effort to secure the passage of the bill.

We mention these things for the purpose of showing that it was evidently the wish of the City Council that the old practice of fining in so far as possible be discontinued.

As a further element, we call your attention to the fact that the people at the recent April election sanctioned a bond issue of \$50,000.00 to be issued to construct a House of Shelter to which female offenders of this class should be committed. This action of the people may be taken to indicate a desire to discontinue the old fining system and to adopt the policy made possible by the new bill.

We are therefore of the opinion that all arrests of this character, whether male or female, and also all keepers or attendants or persons connected with the operation of disorderly houses when found on the premises, should be booked in the first instance under the new law. This does not apply to patrons. Patrons have been held by the court not to be inmates. Patrons are not covered by the "Kate Adams Bill", and should be booked under the city ordinances as in the past.

Yours very truly,

GEO. L. REKER,

Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,

Corporation Counsel.

Authority to Demolish Building Constituting a Nuisance.

September 2, 1915.

HON. JOHN DILL ROBERTSON, M. D., Commissioner of Health.

Dear Sir:

The communication of Dr. G. E. Koehler, Assistant Commissioner of Health, under date of August 19th, together with attached exhibit of pictures and department data of buildings at No. 119-131 East Twenty-second street, asking to be advised as to the authority of the commissioner of health to order the demolition of said buildings, has been referred to me.

It appears from the communication, department data and exhibits furnished, that the aforesaid premises are insanitary, wholly unfit for human habitation and constitute a public nuisance; that such condition has been of long standing and that notice to owner, agent and occupant to abate same has been given repeatedly by the department; that the commissioner of health under authority of the provisions of Section 1409 of The Chicago Code of 1911 has caused an examination to be made of said premises by a board of survey, composed of one medical inspector, one sanitary inspector (appointed by him from the regular force of inspectors), and one building inspector (appointed from the regular force of building inspectors by the commissioner of buildings at the request of the commissioner of health); that said board of survey, after examination of the said premises, made a finding that the said premises constituted a public nuisance as defined in Section 1408 of The Chicago Code of 1911, are in an insanitary condition and the buildings thereon wholly unfit for habitation, and so reported to the commissioner of health; that there was on the fourth day of August, 1915, personal service of notice upon the owner of said premises, Mrs. Ada S. Garrett, to abate said nuisance, and to demolish said buildings within a period of fifteen days, the time fixed by the board of survey as reasonable therefor; that a reinspection of said premises on the nineteenth day of August showed the condition thereof to be unimproved, and that notice to vacate the premises at No. 127 East Twenty-second street was posted thereon on that date.

The above action taken by the department is in accord and compliance with the provisions of Section 1409 of The Chicago Code of 1911. The notice to vacate required to be given in said Section 1409 should be posted and served in accordance with the provisions of Section 1410 of The Chicago Code of 1911, which reads as follows:

“COMMISSIONER OF HEALTH EMPOWERED TO COMPEL VACATION OF BUILDINGS—WHEN.) Whenever it shall be decided by the commissioner of health that any building or part thereof is unfit for human habitation by reason

of its being so infected with disease, or from other causes, as to be likely to cause sickness among the occupants, and notice of such decision shall have been affixed conspicuously on the building, or part thereof, so decided to be unfit for human habitation and personally served upon the owner, agent or lessee, if the same can be found in the state, or the person in possession, charge or control of such building, requiring all persons therein to vacate such building or part thereof for the reasons to be stated therein as aforesaid, it shall be the duty of said commissioner to see to it that such building or part thereof is vacated within ten days from the date of such notice or within a shorter time (not less than twenty-four hours in any case), as may be specified in said notice, if in the opinion of said commissioner such building or portion thereof should be vacated within less than ten days. Said commissioner shall have the power and authority to call upon the Department of Police or upon any member thereof for such assistance as may be necessary to enable him to enforce the provisions of this section, and it shall be the duty of any member of the Department of Police so called upon to render such assistance as may be required of him by said commissioner of health."

After action by the department in accord with the provisions of the above quoted section as to the premises above mentioned, and failure on the part of the parties served to abate the nuisance within thirty days thereafter, it is required that the same be abated and buildings demolished in accordance with the authority given and provided in that part of Section 1409 which reads as follows:

"and if within thirty days after such vacation has been ordered the building or buildings are not put in a sanitary condition, then the commissioner of health shall have the power to order the demolition of such building or buildings; and the fire marshal is hereby authorized and instructed to furnish the necessary service for such demolition, on the request of the commissioner of health."

Yours very truly,

JAMES DONAHOE,

Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,

Corporation Counsel.

Obligation of Gas Company to Supply Gas to Premises.

September 4, 1915.

HON. ELLIS GEIGER, Alderman, 21st Ward.

Dear Sir:

We have your letter of August 3rd, asking to be advised whether the Peoples Gas Light & Coke Company may be compelled to supply the property at 876 Geary street with gas.

The Department of Public Service, at our request, has made an investigation of the situation and informs us that no gas main had been laid by the Gas Company in Geary street, and that the nearest main is in Delaware Place, a distance of about 75 feet from the location above mentioned. We are advised, also, that the building in question is the only one on Geary street.

The Peoples Gas Light & Coke Company is a corporation chartered in 1855, but now composed of a number of companies which, having been given the right to operate gas works and lay pipes in the streets of Chicago, have been consolidated under the original charter of the Peoples Company, or been absorbed by that company, under an act in relation to gas companies passed in 1897. The charter itself does not assume to define the terms upon which the company shall exercise its corporate rights except in a very general way. Under the above referred to act, the gas company is, in general, possessed of the rights and privileges of the constituent companies and is subject also to the legal obligations of those companies.

People's Gas Light & Coke Co. v. Chicago, 194 U. S.

1.

People's Gas Light & Coke Co. v. Hale, 94 Ill. App. 406.

Hurd's Revised Statutes, 1911, Chapter 32, Sec. 165.

We have made a careful examination of the various

ordinances relating to the companies now merged, for the purpose of finding whether any provision occurs in them which might have a bearing upon the duty of the gas company to extend its main in Geary street. The ordinances of two of the companies provide:

“Said company shall, when ordered by a majority of the City Council, extend its main in any block, one-half of which shall be improved by buildings.”

The ordinance of a third company requires such extension when ordered by a two-thirds vote of the City Council, provided three-fourths of the block is improved by buildings. Since, however, the building at 876 Geary street is the only structure on the street, the above provisions would place no obligation upon the company.

In view of the absence of any conditions in the charter or in the ordinances under which the gas company now operates, making it necessary for the company to extend its main in this case, we are of the opinion that, under the general principles of law applicable to gas companies, the owner of the building in question has no relief. Gas Companies, by virtue of the right given them to use the streets and highways of the city, must supply gas on fair terms and without discrimination to all applicants along the line of their mains who comply with the reasonable rules of the company.

Williams v. Mutual Gas Company, 52 Mich. 489;

Portland Natural Gas & Oil Company v. State, 135 Ind. 54.

Furthermore, under the ordinances which must now be observed by the company, service pipes leading from the mains to adjoining properties must be laid without cost to the consumer. The obligations of such companies, however, do not extend beyond this, and it is recognized that in the absence of express provisions requiring it, they do not need to undergo the expenditure of laying their mains in a neigh-

borhood or in a street which is not sufficiently improved to promise a fair return on the preliminary investment.

Public Service Corporation v. American Lighting Company, 67 N. J. Equity 122, 57 Atl. 482.

Moore v. Harrodsburg, 105 S. W. 926.
20 Cyc. 1163.

Very truly yours,

RALPH G. CRANDALL,
Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,
Corporation Counsel.

Eligibility to Pension of Police Officer Convicted of Crime.

September 4, 1915.

TO THE HONORABLE THE BOARD OF TRUSTEES
OF THE POLICE PENSION FUND, CHICAGO, ILL.
Gentlemen:

We are in receipt of your request for an opinion as to the eligibility of Edward McCann, captain in the Police Department, for a pension.

We have examined the application of Captain McCann, and from such examination find that he has been in the service of the Police Department for twenty years and seven days. No objection to his application for a pension has been forwarded to us except the statement that some time previous to his application for a pension he was convicted of crime and sentenced to the penitentiary. He was subsequently pardoned and was restored to the Police Department by an order of court.

Section 6 of the Pension Law provides as follows:

“Whenever any policeman who shall have received any benefit under this act shall be convicted of felony, or shall become an habitual drunkard, or a non-resident of the United States, or shall fail to submit himself for examination as to fitness for duty as provided for in

Section 4 hereof, unless excused in writing by the board, or shall disobey the requirements of said board in respect to said examination, then said board shall order that such pension allowance as may have been granted to such policeman shall cease and determine, and such policeman shall receive no further pension allowance or benefit under this act."

The application of Captain McCann cannot, by any process of reasoning, be brought within the purview of the above section.

We beg to advise your board that while it is true Captain McCann was convicted of felony and sentenced to the penitentiary, the subsequent pardon granted him by the governor of this state, under the well-settled law of almost every state in this Union, automatically wiped out his conviction and restored him to his former status, the same as if he had never been convicted of any crime.

"The effect of a pardon is to make the offender a new man, and to acquit him of all penalties and forfeitures." *Cook v. Middlesex County Freeholders*, 26 N. J. Law (2 Dutch) 326, 328.

"A pardon reaches both the punishment prescribed for the offense and the guilt of the offender. It obliterates, in legal contemplation, the offense itself. In contemplation of law, it so far blots out the offense that afterwards it cannot be imputed to the offender to prevent the assertion of his legal rights. It gives him a new credit and capacity, and rehabilitates him, to that extent, in his former position." *Knapp v. Thomas*, 39 Ohio St. 377, 395, 48 Am. Rep. 462.

"A pardon, in its nature, is wholly exculpatory of the convict's criminality, remits the penalty, and, as it were, renews the man, and rehabilitates him in the garb of innocence." *Young v. Young*, 61 Tex. 191, 193.

"A pardon is an act of mercy flowing from the fountain of bounty and grace. Its effect, when it is a full pardon, is to obliterate every stain, which the law attached to the offender; to place him where he stood before he committed the pardoned offense, and to free him from the penalties and forfeitures to which the law had subjected his personal property; to acquit him of all penalties annexed to the offense for which he obtains his

pardon." *United States v. Athens Armory*, 35 Ga. 344, 362, 24 Fed. Cas. 878, 884.

We, therefore, beg to advise your board that Captain Edward McCann, having completed twenty years of service as a member of the Police Department, is eligible to be granted a pension by your board.

We return, herewith, the application of Captain McCann for a pension.

Respectfully submitted,

JAMES W. BREEN,
Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,
Corporation Counsel.

Failure to Renew Certificate as Mason Contractor.

September 9, 1915.

MR. VERNON L. BEAN, Secretary, Board of Examiners of
Mason Contractors.

Dear Sir:

Your communication of the 25th ultimo has been referred to the undersigned. You request an opinion, under the ordinance regulating the licensing of mason contractors, as to whether a prosecution will lie against a mason contractor for failure to renew his certificate.

This question will have to be determined on the construction of the legislative act and ordinance creating this board, as to whether having an office in the City of Chicago would constitute being "engaged in or desiring to engage in or work at the business of masonry or mason work, either as contractor, sub-contractor, or employing mason in the City of Chicago."

The ordinance creating the Board of Examiners of Mason Contractors was passed January 16, 1914, and appears in the Journal of the Proceedings of the City Council of that date at pages 3458 to 3460.

Section 1 of said ordinance provides as follows:

“Any person, firm or corporation engaged in or desiring to engage in or work at the business of masonry or mason work, either as contractor, sub-contractor, or employing mason, in the City of Chicago, shall submit to an examination and shall obtain a license as a mason contractor or employing mason in the manner hereinafter provided for; provided, that whenever a firm or corporation consists of more than one master or employing mason, it shall not be necessary for more than one member of said firm or one officer of said corporation to undergo such examination in order to obtain a license for such firm or corporation. The words ‘masonry’ or ‘mason work’ as herein used shall include all work in brick, stone, concrete, terra cotta, tile and fire-proofing, or any combination of these materials, as used in and about the construction of buildings or structures above or below the surface of the ground, with the exception of laying brick or concrete sidewalks and brick or concrete paving.”

Section 6 provides:

“All mason work placed in or upon or in connection with any building or other structure in the City of Chicago shall be done in accordance with the ordinances regulating materials, construction, alteration and inspection of such work now or hereafter in force in the City of Chicago, and no mason work shall be done upon any building without a permit being first issued therefor by the commissioner of buildings. In every case where any mason work forms a part of the work to be done in or about the construction of a building or other structure for which a building permit is required under the ordinances of the city, such permit shall only be issued upon the application of a person, firm or corporation licensed as a mason contractor or employing mason, or upon an application containing a statement that all mason work on such building or other structure will be performed by a licensed mason contractor or employing mason; and in case any masonry or mason work on any such building or other structure shall be performed by any contractor or employing mason not licensed as herein provided, such permit shall be revoked, and the person or persons performing such work and the person or persons having such work done shall be subject to the penalty herein prescribed.”

Section 6 makes certain requirements for buildings to be erected in the City of Chicago, and these restrictions made for buildings to be erected in Chicago would, by inference, limit the authority of the examiners to masons doing work within the limits of the city, and would not apply to masons who had an office here but performed all work outside of the city limits.

Section 4 of "An Act to provide for the licensing of mason contractors and employing masons and to regulate the safe and proper construction of buildings" provides:

"Said board of examiners shall, as soon as may be convenient after appointment, meet and shall then designate the times and places for the examination of all applicants desiring to engage in or work at the business of mason contracting or employing masons within their respective jurisdiction;" etc.

Section 1 of said act provides:

"That in all cities of this state of 150,000 inhabitants or over, every mason contractor or employing mason shall be required to obtain an annual license therefor. * * *"

We are of the opinion, therefore, that the provisions of the act of 1913 authorizing the creation of this board of examiners, and the ordinance drawn in pursuance thereof, expressly limit the authority of this board to mason contractors and employing masons doing work within the limits of the examining board's respective jurisdiction; in this case the jurisdiction being the limits of the City of Chicago.

Yours very truly,

GEORGE A. CURRAN,

Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,

Corporation Counsel.

Employment of Bridge Mechanics.

September 10, 1915.

HON. W. R. MOORHOUSE, Commissioner of Public Works.

Dear Sir:

We have your letter dated September 7th, referring to

a contract entered into by the city with the Ketler-Elliott Erection Company for the construction of the super-structure of the bridge over the Chicago river at Webster avenue, and setting forth a letter of the Ketler-Elliott Company, asking permission to employ members of the Bridge and Structural Iron Workers' Union in the erection of the machinery instead of machinists as required by the specifications.

The reason given for this request is that, by an agreement entered into between the Bridge and Structural Iron Workers' Union and the Iron League (whose membership consists of machinists), in settlement of a labor dispute between the two organizations, bridge erection work was awarded to the former union, and that it would be difficult to successfully perform the work under this contract except in conformance with that agreement.

You wish to be advised if it will be necessary for the commissioner of public works to insist on machinists doing this work in compliance with the specifications, or whether it would be proper to permit members of the Bridge and Structural Iron Workers' Union to do said work in accordance with their agreement with the Iron League above referred to.

The commissioner of public works has the undoubted right to insist on a strict compliance by the Ketler-Elliott Company with the specification in question. The law is well established that a party entering into an agreement, without reservation, to do a certain act, will not be excused from performance on account of events subsequently arising making such performance impossible. (9 Cyc. 627.) It has been held that such performance is not excused by the occurrence of an inevitable accident (*Summers v. Hibbard etc. Co.*, 153 Ill. 102; *Tartt v. Ramey*, 158 Ill. App. 468), nor where performance is rendered impossible by controversies between the promisor and third parties. (*McKinnon v. Mickelberry*, 228 Ill. 460.)

Under the contract entered into by the city with said company, it is provided that in case of the failure of the Ketler-Elliott Company to comply with the contract in any

manner, the commissioner of public works shall have the right to declare the same forfeited, either as to a portion or to the whole thereof, and this right may clearly be exercised in spite of the situation, which has arisen, making it difficult for the contracting party to do as agreed.

It is, nevertheless, true that the commissioner of public works has authority to waive strict compliance with the specification in question.

Section 2107 of The Chicago Code of 1911, as amended, provides:

“In all contracts executed by said commissioner, on behalf of the city, the right shall be reserved to said commissioner to finally decide all questions arising as to the proper performance of the work; * * * and in case of improper construction, or of non-compliance with the contract in any manner, to suspend such work at any time or to order the partial or entire reconstruction of such work if improperly done, or to declare the contract forfeited, and to relet the same without further advertisement; etc.”

In accordance with this provision of the city ordinances the contract entered into by the city with the Ketler-Elliott Company stipulates:

“The party of the first party further agrees * * * to carry on said work under the immediate direction and superintendence of said commissioner and to his entire satisfaction, approval and acceptance. All material used and all labor performed shall be subject to the inspection and the approval or rejection of said commissioner, and the City of Chicago hereby reserves to said commissioner the right finally to decide all questions arising as to the proper performance of this contract.”

The contract further provides:

“The right is reserved to the City of Chicago, through its commissioner of public works, to make alterations in the plans or specifications for the work included herein.”

The contract under consideration was prepared and executed on behalf of the City of Chicago by the commissioner of public works, and while a contract entered into by

him must be authorized by the City Council and approved by the mayor, the ordinances have reserved to him, as shown above, full supervision and oversight of the work performed under such contract. It follows from the authority thus vested in him that the commissioner has a discretion which will warrant him in permitting changes in the specifications or manner of performance of the work under any contract where it is considered feasible or desirable from the viewpoint of the city so to do.

The contemplated change in the specifications would not, of course, limit the applicability of the provisions above set forth providing that the work under this contract shall be performed under the "immediate direction and superintendence of said commissioner and to his entire satisfaction, approval and acceptance," and that "all material used and all labor performed shall be subject to the inspection and the approval or rejection of said commissioner."

Very truly yours,

RALPH G. CRANDALL,
Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,
Acting Corporation Counsel.

Interpretation of Police Pension Fund Act Provisions.

September 10, 1915.

TO THE HONORABLE BOARD OF TRUSTEES

OF THE POLICE PENSION FUND.

Gentlemen:

We are in receipt of your request for an opinion on Section 7 of the act to provide for the setting apart, formation and disbursement of a police pension fund in cities having a population exceeding two hundred thousand inhabitants, in force July 1, 1915.

In order to properly construe the above section and to gather the meaning and intent of the Legislature, it is

necessary to read and to construe the entire act. Section 3 of said act reads, in part, as follows:

“Whenever any person shall have been or shall hereafter be appointed and sworn as a probationary or regular policeman in any city where such pension fund has been created, and shall have served for a period of twenty (20) years or more as such *policeman* in the police force of such city, or where the combined years of service of such person in the Police Department and Fire Department of such city shall aggregate twenty (20) years or more * * *.”

It will be observed that this section provides that the applicant for a pension must serve twenty years or more as a *policeman*, while Section 3 of the old Act of 1887, provided for twenty years or more of service in the *Police Department*.

Section 7 of the Act of 1915 reads as follows:

“Sec. 7. Wheresoever the word ‘policeman,’ as used in this act appears, the same shall be interpreted and construed to include and to mean the following:

“Any person who has been appointed and sworn or designated by law as a policeman, prior to the taking effect of this act, and has served in a regularly constituted police department as a policeman, or police patrol driver and police operator and a member of the police force thereof, and contributed to the Police Pension Fund for such time as he has been in the service of such police department as a policeman, or police patrol driver and police operator. The intention being that all policemen, or police patrol drivers and police operators who have so contributed to the Police Pension Fund (their widows and children entitled thereto) shall be entitled to any of the benefits of any pension law in force and effect when this act, in cities within the terms, shall supersede an act entitled ‘An Act to provide for the setting apart, formation and disbursement of a Police Pension Fund in cities, villages and incorporated towns’ (approved April 29, 1887, in force July 1, 1887), as subsequently amended.”

Some question has been raised as to the proper construction to be placed upon the phrase “police patrol driver and police operator” as used in line 5 of said Section 7. While in our opinion clearer and plainer language might have been

used in the phraseology of Section 7 of said act, a careful consideration of said section, after applying the fundamental rules governing the construction of statutes, leaves no doubt in our minds as to the intention of the General Assembly. In fact, the intention of the legislature is expressly stated in said section to be that "all policemen or police patrol drivers and operators who have contributed to the police pension fund shall be entitled to any of the benefits of any pension law in force and effect when this act shall supersede the Pension Law of 1887."

Under the well settled law of this state the word "and" as used in said section between the words "police patrol driver and police operator," in line 5, should be construed and read as the word "or" instead of the word "and." The American and English Encyclopedia, Vol I, page 569, defines "and" as a conjunctive particle used to connect words and sentences. It is often used interchangeably with "or," the meaning being determined by the context.

The principle that "and" and "or" are convertible as the sense may require, applies to their use in statutes.

Bayles v. Murphy, 55 Ill. 236.

Streeter v. The People, 69 Ill. 595.

C. B. & Q. Ry. Co. v. Bartlett, 120 Ill. 603.

Section 20 of an act approved June 26, 1913, entitled "An Act to revise the law in relation to the construction of the statutes" (approved March 5, 1874, in force July 1, 1874), reads as follows:

"The words 'general superintendent of police,' 'secretary to the general superintendent of police,' 'assistant general superintendent of police,' 'first deputy superintendent of police,' 'chief of police,' 'assistant chief of police,' 'city marshal,' 'assistant city marshal,' 'deputy city marshal,' 'chief of detectives,' 'assistant chief of detectives,' and all 'captains,' 'lieutenants,' 'detective sergeants,' 'second-class sergeants,' 'sergeants,' 'inspector of police,' 'detectives,' 'patrolmen,' 'operators' and 'civilian' or 'plain clothes policemen' and 'assistant identification inspector,' shall mean 'policemen employed and in the service of a municipality' and the term 'police force' shall be construed to include

such persons in the employ of a municipality as members of the department of police, who are or shall hereafter be appointed and sworn as policemen."

In accordance with the provisions of the above section, the word "operators" was construed to mean policemen, and operators were permitted to participate in the police pension fund of Chicago and their time of service as operators was credited to them as policemen without any provision of law for their contribution to the police pension fund during the time they served as operators unless they voluntarily contributed.

On August 14, 1907, General Order No. 25 was issued by the general superintendent of police, which said order read as follows:

"In compliance with authority granted by the Civil Service Commission on August 13, 1907, all patrol drivers in the Police Department are hereby transferred to the position of second class patrolmen, there being no change in division or grade.

"All men thus affected will remain in their present positions under the jurisdiction of Captain Adam S. Barber, superintendent of horses, subject to his orders and to the rules and regulations of this department.

"This order to take effect at once.

"GEO. M. SHIPPY,
"General Superintendent."

By the issuance of the above order, police patrol drivers ceased to exist in the Police Department of Chicago and all patrol drivers then in the service became policemen. and many of them, no doubt, still remain in the service of the city.

We cannot but feel convinced that it was the intention of the Legislature to extend to the former drivers the same recognition that was heretofore extended to the telephone operators of the police department, and in computing their time of service required for a pension it desired to take into consideration the years they spent in the service as patrol drivers.

In regard to your request for advice as to accepting

a percentage of salaries from former police patrol drivers, it is our opinion that it is your duty to do so. A careful reading of Section 7 compels us to advise you that the words "police patrol drivers and police operators" cannot be construed, in the language of the statute, to "include and to mean policemen," unless the said police patrol drivers and police operators contribute to the pension fund for the time they served in the police department, either as police patrol drivers or operators. The law is not compulsory upon former police patrol drivers or operators to contribute to the pension fund for their period of service as patrol drivers or operators, but if they desire to have their time of service as patrol drivers or operators to count in making up the twenty years of service required to secure the pension, they will have to contribute to the pension fund. No time is fixed by the statute to make this contribution, and in our opinion they may do so within such reasonable time after the passage of the Act of 1915 as may be fixed by The Board of Trustees of the Police Pension Fund.

Yours very truly,

JAMES W. BREEN,

Assistant Corporation Counsel.

Approved:

CHARLES M. HAFT,

Acting Corporation Counsel.

Interpretation of Provisions in Telephone Company's Ordinance.

September 15, 1915.

HON. JOHN P. GARNER, Commissioner of Public Service.

Dear Sir:

Your letter of recent date, relative to paragraph 2 of Section 1 of the telephone ordinance of May 26, 1913, has been referred to me for an opinion.

From the communication at hand, I take it that the only question involved is whether the Chicago Telephone Com-

pany could be compelled to furnish telephone receivers, transmitters, induction coils and mouthpieces, as therein set forth, to be used in connection with the local intercommunicating system at the Contagious Disease Hospital now being erected.

The words used in the ordinance, viz.: "its municipal telephone system," must be given their ordinary meaning unless it is apparent from the context of the ordinance that they were intended to be used in another sense. In constructing a statute, our Supreme Court has said, in the case of the *Illinois Central Railroad Company v. The City of Chicago*, found in the 173rd Ill. Supreme Courts Reports, at page 471:

"When the words used are clear and unambiguous, they must be taken in their ordinary, natural and commonly received sense."

The word "municipal" is defined by Webster as:

"Of or pertaining to a city or corporation having the right of administering local government,"

and in the Century Dictionary as:

"Of or pertaining to the local self-government or corporate government of a city or town."

The use of the words "its municipal telephone system" in the ordinance would, in my opinion, mean the system of telephone communication extending to and intercommunicating with each and every department of the city government, whether that department is located in the City Hall or in some outlying building or place; in fact, it extends wherever the telephone service is used and necessary to carry on any function of the municipal government.

The operation of the Contagious Disease Hospital is one of the proper functions of municipal government, and is directly in charge of one of the officers of the government, the commissioner of public health and his subordinates.

The section of the ordinance in question certainly applies to and includes the administrative branch of the hospital, and the parts and appliances referred to in Section 1 must be supplied.

Your letter refers to a "local intercommunicating sys-

tem with private lines from the cubicles to the corridors in the ward building, to enable contagious patients to talk with visitors." I am of the opinion that the city cannot compel the telephone company, under the ordinance of May 26, 1913, to supply the parts and appliances referred to in the section in question if said system is used only at the hospital by officers, employes, patients and visitors alike, and if said system is isolated from the general system of the Chicago Telephone Company or the municipal telephone system.

Although such a system, installed and operated, would be a part of the telephone systems of the City of Chicago, being the property of the city, yet it would not be a part of "its municipal telephone system" as meant by the telephone ordinance of May 26, 1913. If, however, the system referred to and intended to be installed can be constructed so that it will operate in conjunction with the general system of the Chicago Telephone Company and with the general system established by the City of Chicago for the transaction of its business and intercommunication between its officers and employes—although incidentally the local intercommunicating system so installed should be used by visitors or by subscribers of the general system of the Chicago Telephone Company—then I am of the opinion that the section in question applies, and the said parts and appliances must be supplied by the Chicago Telephone Company.

In other words, in order to obtain the benefits of paragraph 2 of Section 1 for the city, the parts and appliances must become a part of the telephone system installed *primarily* for the use of the officers and employes of the city.

Very truly yours,

DANIEL A. ROBERTS,
Assistant Corporation Counsel.

Approved

CHARLES M. HAFT,
Acting Corporation Counsel.

Painting of Name on Side of Public Passenger Vehicles.

September 16, 1915.

HON. C. C. HEALEY, General Superintendent of Police.

Dear Sir:

We have your letter of the 10th inst. with enclosure of a letter from Sergeant M. W. Delaney, in which you ask whether the Boulevard Motor Company may be compelled to paint its name and license number on both sides of its taxicabs.

We beg to advise you that the only provision of the city ordinances requiring the name of the owner and license number to be painted on the sides of public vehicles is Section 2594 of The Chicago Code of 1911, which reads as follows:

“2594. NAME OF OWNER AND LICENSE NUMBER ON VEHICLE.) Every automobile, autocar or other similar vehicle, licensed under the provisions of this article, shall have the name of the owner thereof and the number of its license plainly painted in letters at least one and one-half inches in length, in a conspicuous place on the outside of each side of such vehicle, and such name and number shall be kept so painted, plainly and distinctly at all times while such vehicle is in use during the continuance of such license. Upon the expiration of such license (unless same is forthwith renewed) such name and number shall be at once erased from such vehicle, and such vehicle shall not thereafter be used with such name or number thereon.”

You will note that this section applies only to automobiles, autocars or other similar vehicles “licensed under the provisions of this article.” The article in question refers to automobiles, autocars or other similar vehicles “which shall stand or be kept upon any public cab or hack stand, or upon any street or public way in the city, for employment.” This language is broad enough to apply to taxicabs which stand upon any public cab or hack stand or upon any street or public way for hire, but so far as we have been able to ascertain there is no provision similar to Section 2594 apply-

ing to taxicabs unless the latter conform to the section above referred to.

We herewith return the letter received from Sergeant Delaney.

Yours very truly,

RALPH G. CRANDALL,
Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,
Corporation Counsel.

Scope of Statute Concerning Maternity Hospitals.

September 16, 1915.

HON. JOHN DILL ROBERTSON, Commissioner of Health.

Dear Sir:

We have your letter dated August 27, requesting an opinion of this department upon the question whether the act recently passed by the state Legislature providing for the licensing, inspection and regulation of maternity hospitals invalidates, wholly or in part, the city ordinance relating to hospitals contained in Chapter 38, Article 9, of The Chicago Code of 1911.

We have carefully examined the ordinance and statute in question, with a view to reaching a conclusion upon the question which you suggest, and find that both provide that it shall be unlawful for any person to maintain such a hospital without first obtaining a license therefor, in accordance with the terms therein contained, and impose a penalty for violation of its provisions. The license under the statute is required to be issued by the State Board of Administration, while that under the ordinance must be obtained upon application to the commissioner of health. Both the statute and the ordinance further provide that in case the persons in charge of any such hospital violate any of the provisions thereof, the license may be revoked, and subject such institutions at all times to the inspection and supervi-

sion of the state and corporate authorities respectively. The city ordinance also requires the payment of an annual license fee of \$100, and that before the hospital is opened or erected frontage consents shall be obtained from a majority of the property owners in the block where the hospital is proposed to be located.

Although the ordinance has a larger scope than the act passed by the legislature, and applies to all hospitals, whereas the statute is limited in its application to hospitals receiving maternity cases, we may consider the two enactments substantially similar in this respect, and that the provisions above enumerated are the only ones which need be considered in connection with this question.

The power of any municipality to regulate or require a license for the carrying on of any occupation emanates from the state. One of the most important powers delegated to cities in Illinois is that found in Hurd's Revised Statutes, 1911, Chapter 24, Section 62, Clause 78, which confers upon the City Council authority

"To do all acts, make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease,"

and it is under this provision of its charter that the City of Chicago has undertaken the control and supervision of hospitals within its corporate limits. The law is well established that the power to regulate any occupation carries with it the power to require a license and exact a license fee.

Gundling v. Chicago, 176 Ill. 340, 347.

Kinsley v. Chicago, 124 Ill. 359.

Spiegler v. Chicago, 216 Ill. 114.

The delegation of such power, however, does not divest the state of its right to exercise direct control over the subject-matter, either exclusively or concurrently with the municipality. The question here involved is whether, by the statute requiring hospitals to obtain a license from the State Board of Administration, the state has or has not withdrawn from the city the authority previously granted to regulate such institutions.

This is a question not free from difficulty but, after a careful consideration of the issues involved, we have reached the opinion that the city's jurisdiction remains. The statute does not expressly revoke the authority previously vested in the city, and contains no indication whatsoever that it was the intent of the legislature to subject the operation of maternity hospitals to the exclusive control of the state authorities.

In this state, the question here involved has apparently not been considered by the courts, except in the case of *Wilkie v. City of Chicago*, 88 Ill. App. 315, 188 Ill. 444. In that case the court was asked to grant an injunction against the enforcement of an ordinance requiring plumbers to obtain a license, and pay a fee of \$30 per year therefor, upon the ground that the state subsequently passed an act dealing with the same subject, and requiring plumbers to obtain a license from a board appointed under the provisions of that act. In the Appellate Court it was held that the passage of the statute did not affect the validity of the city ordinance, and that the taking out of licenses by plumbers could be required concurrently by city and state governments. The Supreme Court, however, in construing the provision of the statute declaring that the license issued under that act "shall be valid and have force throughout the state" held that it was the intention of the Legislature, as evidenced in the provisions of the statute, that the license granted thereunder should give the holder an absolute and unqualified right to exercise his rights thereunder, and that the city's authority to require such a license was revoked.

In other states this question has been before the courts, and the latter have uniformly held that, in the absence of any provision to the contrary, the city may continue to exercise authority delegated to it, although the state later legislates upon the same subject.

Henback v. State, 53 Ala. 523.

Wright v. Atlanta, 54 Ga. 645.

Harrison v. State, 9 Mo. 530.

New Orleans v. Turpin, 13 La. Annual 56.

Ex parte Siebenbauer, 14 Nev. 365.

We believe that in the Wilkie case the decision reached by the Supreme Court was based upon the provision of the statute above mentioned, which apparently indicated the intent of the Legislature to assume exclusive control over the occupation in question, and that, if the question is in the future presented where the statute contains no provision either expressly or impliedly limiting the authority of the city to exercise similar control, it will be held that the city and state governments may concurrently require licenses and exercise supervision. There is nothing illogical or impossible in such a situation.

In view of the opinion which we have reached in connection with this matter, it will be unnecessary for us to consider the additional questions which you suggested, based upon the hypothesis that the passage by the Legislature of the statute in question invalidated the requirement of a license under the city ordinance. If our conclusion is correct that the city may require a license in spite of the additional license required from the State Board of Administration, the remaining provisions of the ordinance will likewise not be affected by the statute.

Very truly yours,

RALPH G. CRANDALL,
Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,
Corporation Counsel.

Dormer Windows and Extensions on Upper Parts of Frame Buildings.

September 16, 1915.

HON. CHARLES BOSTROM, Commissioner of Buildings.

Dear Sir:

Your communication of August 28th, addressed to the Honorable Richard S. Folsom, Corporation Counsel, wherein you ask to be advised of your authority to issue permits:

(A) For the construction of dormer windows in one story and attic frame buildings, said windows not to increase the height or ground area of said building;

(B) For the change of a one story and attic frame building with gable roof to a flat roof, if the highest point of the flat roof does not exceed the highest point of the original roof,

has been referred to me and I have the honor to respond.

The purpose of Article XVII is that the dangers from fire to, by and from frame buildings, lumber-yards and lumber should not be increased in the City of Chicago.

Paragraph (a) of Section 654 The Chicago Code of 1911, as amended on March 12, 1912, is as follows:

“654. FRAME BUILDINGS PROHIBITED—EXCEPTIONS.)

(a) Hereafter no frame building shall be erected, nor any frame addition made to any existing frame building, within the fire limits of the city, except where express provision is made in this chapter therefor.”

There is no express provision in Article XVII authorizing the construction and the issuance of permits therefor of dormer windows as set forth in the foregoing query of paragraph (A), nor for the change of construction of a one story and attic with gable roof to a flat roof, the highest point of which flat roof shall not exceed the highest point of the original roof as set forth in the foregoing query of paragraph (B), and under a strict construction of the above quoted paragraph of Section 654, express provision not being made therefor elsewhere in the chapter, such construction and change of construction are prohibited and permits may not issue therefor.

But it is a fundamental rule of construction that all ordinances relating to the same subject should be construed together—and that where they can be construed in two ways, one of which would render them valid and the other invalid, the construction which would give force and effect to same as a valid enactment should be followed.

Section 657 authorizes the raising of different parts of a frame building to a uniform height and is as follows:

“657. FRAME BUILDINGS CARRIED TO A UNIFORM HEIGHT.) Where the different parts of a frame building inside the fire limits are of different heights a one-story portion may be raised to the height of two stories, provided the greatest height thereof does not exceed the limits of height prescribed in this chapter

for frame buildings, and, provided, that no room in the existing building or in the addition thereto shall violate the requirements of this chapter for habitable rooms.”

The last above quoted section permits an increase in size over the original dimensions of the buildings and is an express provision allowing that which is prohibited by the paragraph quoted from Section 654 and the following section.

“653. REPAIRING OF FRAME BUILDINGS WITHIN FIRE LIMITS.) Frame buildings within the fire limits which have been damaged by fire, decay or otherwise, to an extent not greater than fifty per cent of their value may be repaired, provided there is no increase in size of such buildings over their original dimensions, and, provided that incombustible roof covering required by Section 596 is used. And, provided, further, that where any frame building is raised for the purpose of erecting a basement story under the same, the walls enclosing such basement shall be of masonry.”

It seems patent that the purpose of the ordinance is no more violated in the construction of a dormer window than in the raising of the one-story part of a two-story frame building to a two-story height.

We, therefore, conclude:

(A) That you have authority to issue permits for the construction of dormer windows in one-story and attic frame buildings, said windows not to increase the ground area of said buildings, and not to increase the height beyond the highest part of the building as it exists before the construction of said windows:

(B) That you have authority to issue permits for the change of a one-story and attic frame building with a gable roof to a flat roof, provided that the highest point of the flat roof does not exceed the highest point of the original roof.

Yours very truly,

JAMES DONAHOE,

Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,

Corporation Counsel.

Operation of Slot Machines.

September 20, 1915.

HON. C. C. HEALEY, General Superintendent of Police.

Dear Sir:

You submitted to us a small package of candy labeled "Breath Confection," which you say is being dispensed by slot machines of the type which indicate beforehand what the player is to receive. You state further that in the places where these machines are operated the same is exchanged for a package of gum if the player prefers gum. Your query is whether, under our recent opinion concerning these slot machines, the laws or ordinances are violated by this manner of operating them.

So far as making the machine a gambling implement is concerned, the use of candy in place of gum does not change its character, although it may be that a fraud is perpetrated when the indicator shows that gum is to be delivered and candy is turned out in its place. Evidently that theory is entertained in the places where this is done, since you may say that they are ready to exchange the confection for gum.

On the other hand the piece of candy in question appears to be of trifling value. The writer has already stated to you verbally that in case these machines turn out packages which have no commercial value or packages so far below the standard as to be merely of nominal value, you would have the right to assume that the machines are not vending machines, as they purport to be, but gambling machines where the play requires a double stake in order to secure a chance to get a prize.

We do not recommend arrests or seizures where the parties are willing to supply what the machine calls for in the way of merchandise, even though the fact that the machine does not itself deliver it is a circumstance to be considered when you undertake to prove a case of actual gambling.

We again call your attention to the statement made in our original opinion to the effect that if a person makes successive plays on such a machine he is obviously doing so for the purpose of gambling.

We understand the persons operating the machines place great reliance on the opinion of a majority of a divided court in the Canadian case of *Rex v. Stubbs*, 8 Western Weekly Rep. 902. The court in that case held as follows:

“Each operation of the machine is, in itself, a game, and the fact that the inducement is held out that in some future game the operator may receive something more than an adequate return for his money does not introduce the element of chance into any game which may be played upon the machine, and, therefore, while it may be open to question whether the machines adhere to the spirit of the law, they do not violate its letter and, this being a criminal charge, the latter question is the only one to be considered.”

While this opinion is entitled to respect, it must be borne in mind that it does not control the action of the courts in this state, and we have no doubt that if a case of the kind we suggest, where the person playing is clearly doing so for the purpose of winning a prize on successive plays, is presented to our courts, a different decision will be arrived at. In this connection we call attention to the words of Harvey, Chief Justice in the court which decided the above case, in his dissenting opinion. He says, among other things:

“I think the Magistrate was quite right in saying that if there were nothing more involved than putting in five cents and taking out what the indicator shows you will receive, there would be no game played any more than in obtaining a postage stamp from an automatic vending machine. It seems absolutely clear to me that what the operator in nine cases out of ten spends his five cent piece and, in all cases spends his five cent trade check for, is the chance of some trade checks in the next operation of the machine, and that is where the chance is. I do not see that the game can be said to be confined to a single operation of the machine any more than a game of poker could be said to be confined to one draw of the cards. If no man were

permitted to operate the machine twice in succession it would be the case so long as there could be no collusion between him and another to operate for each other, but also all incentive to operate the machine would thereby be gone. As it is with the privilege of operating the machine more than once, the operator's game is to put in nickels or checks for the purpose of getting back something more valuable and that is not gum. Having control of the machine and thereby the right of the next operation there is a chance in a single throw, not a chance of what will be discharged from the machine, but a chance of what will be shown on the indicator as what the operator will receive in the next operation. In that is the chance, and that is the game he is playing."

We have taken pains to define our position in this matter because many questions have been asked concerning it by members of the police department, and in order that the police may understand fully what their duty is in the premises. In brief, our attitude is, first, that the machine cannot be confiscated as a gambling device unless it is operated for gambling purposes, second, that it may be assumed by the police that it is being operated as a gambling device as distinguished from a vending device where the merchandise returned for the money is of no value or of merely nominal value, third, that where a player makes successive plays on same clearly for the purpose of securing a chance for a prize on the second or succeeding plays it is being operated as a gambling device.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,

Corporation Counsel.

Interpretation of Provisions of House of Correction Pension Fund Act and Police Pension Fund Act.

September 20, 1915.

HON. EUGENE R. PIKE, Comptroller.

Dear Sir:

We are in receipt of your favor of September 14, 1915, asking us for an opinion on Senate Bill No. 195 (otherwise known as the House of Correction Pension Fund Act) and Senate Bill No. 320 (otherwise known as the Police Pension Fund Act).

We gather from the enclosures sent us with your communication that you desire us to construe the provisions of the said acts that regulate the amounts of certain fines for the violation of certain ordinances that are directed by law to be paid over to the various pension funds and to the House of the Good Shepherd and the Chicago Erring Women's Refuge for Reform.

The statute enacted in 1869 provides that "all fines collected by the City of Chicago from keepers, inmates and visitors of houses of prostitution shall be set aside for the sole use and benefit of the Chicago Erring Women's Refuge for Reform and the House of the Good Shepherd, and shall be equally distributed between both institutions.

Section 7 of the Police Pension Fund for cities having a population of over 150,000, approved June 13, 1915, provides "that there shall be set apart the following moneys to constitute a police pension fund * * * all moneys received for fines for carrying concealed weapons," and Section 8, "one-half of all costs collected for violations of city ordinances."

Section 1 of "An Act to provide for the setting apart, formation and distribution of a House of Correction Employes' Pension Fund in cities having a population exceeding 150,000," approved and in force July 1st, 1911, as amended and approved June 29, 1915, in force July 1st, 1915, provides "that the House of Correction Employes' Pension

Fund shall consist of * * * 3% of the fines and costs collected for violations of city ordinances where the persons convicted of such violations have been incarcerated in the House of Correction for the nonpayment of such fines and costs, both of which two last mentioned payments shall be for a period of three years beginning with the year 1915."

Section 9 of an act known as "An Act to provide for the setting apart, formation and disbursement of a police pension fund in cities having a population exceeding 200,000 inhabitants," approved June 29, 1915, in force July 1, 1915, provides, in part, as follows:

"That all revenue which the Police Pension Board abrogated by this act would have been by law entitled to between June 30, 1915, and January 1, 1916, had not this act become operative shall be paid to and become the property of the said board of trustees hereby created for the uses and purposes set forth."

Section 15 of the House of Correction Pension Fund

Act provides, in part, as follows:

"This law shall take preference over all other laws, and all laws and parts of laws which are inconsistent with this act or any provisions hereof are hereby repealed."

The act creating the House of Correction Pension Fund, in force July 1, 1915, and the act creating the Police Pension Fund were both approved on June 29, 1915, and both became effective July 1, 1915.

While there is apparently some conflict in the provisions of the three statutes referred to in your communication, we are of the opinion that there is not such a conflict and that the provisions of the statutes are not so irreconcilable as to compel us to hold that the statute affecting the House of the Good Shepherd and the Chicago Erring Women's Refuge for Reform and the one regulating the Police Pension Fund are repealed under Section 15 of the House of Correction Pension Fund Act.

It is a well settled rule of law that a statute is not repealed merely by the enactment of another statute on the same subject. There must be a repugnancy between

the provisions of the new law and the old law to work a repeal by implication, and even then the old law is repealed only to the extent of such repugnancy.

McGillen v. Wolff, 83 Ill. App. 227.

County of Cook v. Gilbert, 146 Ill. 268.

Repeals by implication are not favored and will not be indulged in unless it is manifest that the legislature so intended.

Bruce v. Schuyler, 9 Ill. 221.

The Bd. of Supervisors of McDonough County et al. v. James M. Campbell et al., 42 Ill. 490.

City of E. St. Louis v. Maxwell, 99 Ill. 443.

I. C. R. R. Co. v. Gilbert, 157 Ill. 354.

People v. Murphy, 202 Ill. 493.

It is an elementary rule that where two statutes upon the same subject can be construed so as to give force and validity to both, they should be construed in that way.

In the construction of statutes, the intention of the legislature, where more than one act has been passed affecting the same matter, must be taken into consideration, and when the intention of the legislature is apparent it controls in determining the construction to be placed upon the statute.

Part of Section 9 of the Police Pension Fund Act, effective July 1, 1915, expressly provided that "all revenue which the Police Pension Board abrogated by this act would have been by law entitled to between June 30, 1915, and January 1, 1916, had not this act become operative shall be paid to and become the property of the said board of trustees hereby created for the uses and purposes set forth."

It is our opinion that it was not the intention of the legislature to repeal that part of the Police Pension Fund Act designating that all fines imposed for carrying concealed weapons and one-half of all costs for violations of city ordinances should be turned over to the Police Pension Fund. We have also reached the conclusion that it was not the intention of the legislature to repeal the act giving to the House of the Good Shepherd and the Chicago Erring Women's

Refuge for Reform all fines collected by the City of Chicago from keepers, inmates and visitors of houses of prostitution.

Section 1 of the House of Correction Pension Fund Act provides for using for pensions 3% of the fines and costs collected for violations of city ordinances where the persons convicted of such violations "have been incarcerated in the House of Correction for nonpayment of such fines and costs." No provision is contained in the House of Correction Pension Fund Act to give any fines or parts of fines to the House of Correction fund unless said fines and costs are paid by or for persons who have been incarcerated in the House of Correction, and consequently fines paid by persons convicted of carrying concealed weapons or fines paid by persons convicted of being either keepers, inmates, or visitors of houses of prostitution, when such persons so convicted have not been incarcerated in the House of Correction, are in no way affected by Section 1 of the House of Correction Pension Fund Act.

We are therefore of the opinion that that part of Section 1 of the House of Correction Pension Fund Act only modifies the Police Pension Fund Act of 1887 to the extent that 3% of the fines imposed for carrying concealed weapons and paid by or for persons who have been incarcerated in the House of Correction should be deducted by the comptroller and turned over to the House of Correction Pension Fund, and the remaining 97% of said fines so collected should be turned over to the Police Pension Fund, for the period between June 30, 1915, and January 1, 1916.

We are also of the opinion that 3% of the fines collected from persons convicted of being either keepers, inmates or visitors of houses of prostitution, when such persons so convicted have been incarcerated in the House of Correction, should be deducted by the comptroller and turned over to the House of Correction Pension Fund, and the remaining 97% of fines collected from persons incarcerated in the House of Correction should be distributed equally between the House of the Good Shepherd and the Chicago Erring Women's Refuge for Reform.

In regard to Section 8 of the Police Pension Fund Act of 1887, which provided that one-half of all costs collected

for violations of city ordinances should be paid to the Police Pension Fund, it is our opinion that where fines and costs are paid for or by persons incarcerated in the House of Correction, that the House of Correction Pension Fund is entitled to 3% of the costs, and after that 3% is deducted the remaining 97% should be divided so that the Police Pension Fund would receive 50% during the period between June 30, 1915, and January 1, 1916, and during that same period the City should receive the remaining 47%.

We herewith return your enclosures, with the exception of the certified copy of the Police Pension Fund Act, which we will return in a few days. We have taken the liberty of retaining same in our office in order to make a copy of it for the future use of this office.

Yours very truly,

JAMES W. BREEN,
Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,
Corporation Counsel.

Status of Morals Commission.

September 21, 1915.

MISS MARY SYNON, Secretary Morals Commission.

Dear Madam:

We are in receipt of your letter of the 15th inst., requesting an opinion concerning the official power of the Morals Commission to appoint its secretary.

The Morals Commission of the City of Chicago was created by an ordinance passed November 30, 1914. Section 1 of said ordinance provided—

“That there shall be and there hereby is created in and for the City of Chicago, a commission to be known as the ‘Morals Commission of the City of Chicago,’ the members of which shall be appointed by the mayor with the approval of the City Council, and which commission shall consist of five (5) persons who shall be quali-

fied electors of said city and each of whom shall have resided therein at least one year preceding his appointment. * * *

This section creates this commission and department of the city, and as such brings its several employes within the provisions of the Civil Service Law.

Section 3 of the Civil Service Law of the City of Chicago provides—

“Section 3. CLASSIFICATION. Said commissioners shall classify all the offices and places of employment in such city, with reference to the examinations hereinafter provided for, except those offices and places mentioned in Section 11 of this act. The offices and places so classified by the commission shall constitute the classified civil service of such city, and no appointments to any of such offices or places shall be made except under and according to the rules hereinafter mentioned.”

Section 6 of this act is in part as follows—

“Section 6. EXAMINATIONS. All applicants for offices or places in said classified service, except those mentioned in Section 11, shall be subjected to examination which shall be public, competitive and free to all citizens of the United States, with specified limitations as to residence, age, health, habits and moral character. * * *

Section 11 of this act is as follows—

“Section 11. OFFICERS EXCEPTED FROM CLASSIFIED SERVICE. Officers who are elected by the people, or who are elected by the City Council pursuant to the city charter, or whose appointment is subject to confirmation by the city council, judges and clerks of election, members of any board of education, the superintendent and teachers of schools, heads of any principal department of the city, members of the law department, and one private secretary of the mayor, shall not be included in such classified service.”

The Civil Service Act thus provides that all offices and places of employment, except those mentioned in Section 11 of this act, which does not mention a secretary of the Morals Commission, shall be classified by the Civil Service Commission, and no appointment to any of them shall be made except after a competitive examination and in accordance with the

Civil Service Act and rules of the Civil Service Commission.

Any person appointed to an office or place of appointment after the Civil Service Act was adopted by the City of Chicago and who was not so appointed would be in the service of the City of Chicago in violation of the provisions of this act.

Section 4 of the ordinance creating the Morals Commission provides:

“Section 4. The commission shall have power to *appoint according to law a secretary* at a salary to be fixed by the City Council, and to appoint according to law such clerical and other assistants as the City Council from time to time shall determine.”

The phrase “according to law” or “according to the provisions of law” does not refer to any law generally, but refers to the provisions of the Civil Service Act. *People v. Loefyer* 175 Ill. 585.

We advise you therefore, that the secretary of the Morals Commission of the City of Chicago should be appointed according to the provisions of the Civil Service Law heretofore set forth.

Very truly yours,

GEORGE A. CURRAN,

Assistant Corporation Counsel.

Approved:

CHARLES M. HAFT,

Acting Corporation Counsel.

Frontage Consents for Amusements.

September 22, 1915.

HON. CHAS. BOSTROM, Commissioner of Buildings.

Dear Sir:

Your letter of the 13th inst. in which you submit to this department a request for information as to what frontage consents are necessary for the erection of a Class IV-C moving picture theater with less than 1,000 seats, has been referred to the undersigned for reply.

The proposed location of this theater is 3957-61 Grand boulevard. With your letter you enclose a rough sketch, showing the location of the proposed theater. It appears that 39th and 41st streets intersect Grand boulevard and are continuous streets. Between these two streets Oakwood boulevard intercepts Grand boulevard on the east side thereof 275 feet south of 39th street, 40th street crosses the west side of Grand boulevard 490 feet south of 39th street, and continues east from Grand boulevard 270 feet south of where its south line touches Grand boulevard on the west, *i. e.*, 40th street makes a jog of 270 feet.

The proposed theater is on the east side of Grand boulevard between Oakwood boulevard and 40th street.

Section 117 of The Chicago Code of 1911 provides that frontage consents shall be obtained for amusements of the class above referred to, and reads as follows:

“FRONTAGE CONSENTS AND OTHER PROHIBITIONS.) It shall hereafter be unlawful for any person, firm or corporation to produce, offer, present or carry on any of the entertainments of any of the foregoing classes, * * * on any street in any block in which two-thirds of the buildings on both sides of the street are used exclusively for residence purposes, without the written consent of a majority of the property owners according to frontage on both sides of such street in such block. * * *”

Section 711, Article 24, in the same chapter on buildings, provides as follows:

“Whenever a provision is made in this chapter that frontage consents shall be obtained for the erection, construction, alteration, enlargement or maintenance of any building or structure in any block, the word ‘block,’ so used, shall not be held to mean a square, but shall be held to embrace only that part of a street bounding the square, which lies between the two nearest intersecting streets, one on either side of the point at which such building or structure is to be erected, constructed, altered, enlarged or maintained. * * *”

You state in your letter that these streets so cut up the block in such a manner that you are unable to determine what amount of frontage consent is necessary, and request an opinion thereon.

Under Section 711, as above referred to, a block is defined in the ordinances as the distance between two intersecting streets. If you were to eliminate Oakwood boulevard and 40th street, it could readily be seen that under the rule as laid down above, it would be necessary for the applicant to obtain the frontage consents from 39th to 41st streets, these two streets in such case being the intersecting streets. Since, however, Oakwood boulevard terminates at Grand boulevard between 39th and 41st streets, and 40th street crosses Grand boulevard with a jog between 39th and 41st streets, the question you ask becomes one of interpretation of the word "intersecting" as used in said ordinance.

This department has heretofore in an opinion rendered April 4, 1912 (Vol. 5, Opns. of the Corp. Couns., p. 740, 741), called attention to the distinction which the dictionaries make between the words "intersecting" and "intercepting," and in said opinion says:

"An *intersecting* street cuts both sides of a street, making four (4) corners, while an '*intercepting*' does not cut both sides of a street."

I have made a diligent search of the authorities and the decisions of the various courts treating on this matter, and while they are few, I have found legal precedent sustaining this department in its ruling.

I refer to the case of *Atwood v. Connecticut Co.*, 82 Conn. 539. In this case, where an ordinance required cars to slacken speed to four miles an hour "when crossing all intersecting streets," it was held that where two streets terminate at a certain cross street in a manner similar to Oakwood boulevard, they cannot be considered intersecting streets. They hold "that a street running into but not continued beyond another does not intersect." The court at page 543 says:

"Ordinarily we do not speak of a street which starts from or terminates in another, as intersecting it. It is only when it crosses or cuts through the other that it is said to intersect it, and that the streets are said to be intersecting streets. Otherwise it is said to extend to or from the street in which it terminates. 'Intersect'

ordinarily means to cross ; literally to cut into or between. *State v. New Haven & N. Co.*, 45 Conn. 331, 344. To the same effect are the definitions given in the dictionaries."

Basing my opinion on the above decision, I believe that Oakwood boulevard cannot be considered an intersecting street, but that 40th street must be so considered, since it crosses Grand boulevard, even though irregularly.

Therefore, the block must be considered as running from 39th street to 40th street on the east side of Grand boulevard.

I am of the opinion that frontage consents must be counted on Grand boulevard as though Oakwood boulevard did not exist. That is to say, on the east side of Grand boulevard from 39th street to 40th street and on the west side thereof from 39th street to the north side of 40th street extended west to the west side of Grand boulevard.

Yours very truly,

LOUIS SALINGER,

Assistant Corporation Counsel.

Approved:

CHARLES M. HAFT,

Acting Corporation Counsel.

Fees of Oil Inspector.

September 23, 1915.

HON. PAUL HENDERSON, City Oil Inspector.

Dear Sir:

We have your letter of September 14, 1915, with enclosure of a letter addressed to the Keystone Oil & Manufacturing Company by the attorney of that company, asking for advice as to your right to fees from said company in the case of oil inspected by you, which is later shipped to other points within the state.

The state law governing the inspection of oil, gasoline and other products of petroleum, in effect July 1, 1915, contains the following provision:

"Sec. 7. Any refiner or *producer* or any *dealer in*, or manufacturer, person, firm or corporation using, directly or in the manufacture of their product, coal oil, naphtha, gasoline, benzine, mineral seal, signal or other mineral oil or fluid, the product of petroleum, in any city, village or town in which such inspector is appointed, who shall neglect to give notice to such inspector, of any such oil or fluid in his possession, within two days after the same is made or refined by him or received into his possession, or shall offer any such oil or fluid for sale before the same has been so inspected, or shall sell or attempt to sell to any person, for illuminating purposes, any such oil which is below the approved standard—that is, having igniting point less than one hundred and fifty degrees Fahrenheit, as indicated and determined in the manner herein provided, or shall use any package, cask, barrel or other thing having the inspection brand thereon, the oil or fluid therein not having been inspected, or shall counterfeit any brand, shall be fined not exceeding \$200 and be liable to the party injured for all damages occasioned thereby, and all the casks, barrels or packages so falsely used, and their contents, shall be forfeited, and may be seized and sold."

Our understanding is that the Keystone Oil & Manufacturing Company receives shipments of oil in this city of different grades which are mixed to produce oil of a character and quality satisfactory for selling purposes and that this oil is then sealed in containers and sold either within or outside the state, as ordered.

Under these facts the company is, without doubt, a "dealer in" or a "producer of" oil, and clearly comes within the terms of the above section of the state law which imposes a penalty upon any one "who shall neglect to give notice to such inspector, of any such oil or fluid in his possession, within two days after the same is made or refined by him or received into his possession, or shall offer any such oil or fluid for sale before the same has been so inspected * * *."

The question suggested by the attorney of the Keystone Oil & Manufacturing Company is whether or not the effect of the above section is altered by Section 8 of the state law, which provides as follows:

“Sec. 8. All coal, oil, naphtha, gasoline, benzine, mineral seal, signal or other mineral oil or fluid, the product of petroleum, shipped by any refiner or producer within the state must be inspected by the inspector at the receiving point.”

We are informed that it is the practice of the city oil inspector to have an inspection made of all oil which is placed in containers by the said company, regardless of the destination to which it may later be sent, but that the fees charged for such inspection are rebated in the case of oil shipped to points within the state where it is again inspected. It is now urged that even if there is no inspector at the point of destination where oil is shipped to points within the state, the effect of section 8 is that inspection here is not required, and that fees paid for the inspection of this oil should be rebated.

Our opinion is that under the circumstances assumed, the law definitely requires inspection here and that the City Oil Inspector is therefore within his rights in refusing to rebate the fees in question.

Whether or not fees *must* be rebated where the oil is inspected again at the receiving point, as required by Section 8, we are not considering, but the purpose of the act is clearly to provide for the inspection of all oil produced or used within the state, and in view of the fact that under the law there is only provision for oil inspectors in cities and villages in which the mayor or president of the board of trustees may appoint them, it follows that where there is no inspector at the point of destination an inspection should be made and paid for at the point of shipment.

Very truly yours,

RALPH G. CRANDALL,
Assistant Corporation Counsel.

Approved:

CHARLES M. HAFT,
Acting Corporation Counsel.

Compensation for Overtime for City Employee.

September 27, 1915.

HON. WM. G. KEITH, Commissioner of Gas and Electricity.

Dear Sir:

In reply to your letter of the 16th inst., wherein you enclose a letter of August 3rd received from the American Association of Engineers, together with letters of September 8th and 15th received from Attorney W. A. Bither, in regard to the claim of A. H. Krom, in which he claims extra compensation due him for working overtime while he was employed in your department, we submit the following:

Article VI of the Cities and Villages Act treats of the officers, their appointment, duties, bonds, qualifications, the compensation of aldermen and the mayor; and Section 15 of that article provides, as follows:

“All other officers may receive a salary, fees or other compensation to be fixed by ordinance, and after the same has been once fixed such fees or compensation shall not be increased or diminished to take effect during the term for which any such officer was elected or appointed.”

The “Act to enable the corporate authorities of cities to establish and fix the salaries of city officers,” approved April 23, 1873 (1 Starr and Curtis, 2nd Edition, page 826), confers authority on the common council or legislative authority to fix the amount of salary to be paid all city officers in the annual appropriation bill or ordinance, and provides that “no extra compensation shall ever be allowed to any such officer or employe over and above that provided in the manner aforesaid.”

In the case of *Sheahan v. City of Chicago*, 127 Ill. App. 626, the statement by the court was as follows:

“Appellant brought assumpsit against appellee for notary’s fees for administering oaths and taking affidavits outside of business hours established by the City of Chicago, in special assessment proceedings instituted by the city. Appellant during the whole period in which the oaths and affidavits were taken was in the employment of the city as superintendent of special assessments, and

was in receipt of an annual salary as such superintendent. * * *

“From November 16, 1891, to and including March 2, 1895, appellant was a duly appointed and qualified notary of the State of Illinois. As such notary, appellant administered certain oaths and took affidavits set forth in the bill of particulars filed in this cause, between 5 o'clock p. m. and 9 o'clock a. m. of the days on which they were taken, for which he claims the statutory fees, amounting to \$4,794.50. The bill for the fees was approved by the corporation counsel of the city.

“By agreement the cause was submitted to the court for trial without a jury. The court found the issues for the defendant, appellee, and entered judgment on the finding.”

And in said case of *Sheahan v. City of Chicago, supra*, the Court said:

“It is an inflexible rule that an official can only demand such compensation as the law has fixed and authorized for the performance of his official duties.”

To the same effect:

City of Decatur v. Vermillion, 77 Ill. 315.

Coles County v. Messer, 195 Ill. 54.

City of Durango v. Hampson, 29 Colo. 77.

Crocker v. Brown County, 35 Wis. 284.

In the *Sheahan* case, the court also held that the commissioner of public works cannot admit a liability upon the part of the city and so bind the same if such obligation is not valid in law. In the same case the Court also held that the corporation counsel of a city, by approving a voucher calling for extra compensation to a public official, does not thereby bind the city.

We are, therefore, of the opinion from the holding of the court in the case of *Sheahan v. City of Chicago, supra*, that the claim here in question is not a legal claim against the city.

Yours very truly,

CHARLES E. PEACE,

Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,

Corporation Counsel.

Effect of Game Law of 1915 on Fishmongers.

September 27, 1915.

HON. CHARLES J. FORSBERG, City Collector.

Dear Sir:

We are in receipt of your letter of the 24th instant, asking our opinion as to whether a fishmonger, as appearing in Section 1322 of The Chicago Code of 1911, shall be construed as covering a dealer in wholesale or retail fish, or both, and as to the effect of the Game and Fish Act of 1915 on this ordinance.

Section 1322 of The Chicago Code of 1911 reads as follows:

“1322. POULTERERS — FISHMONGERS — LICENSES REQUIRED.) No person shall carry on, engage in or conduct the business of poulterer or keeper of a place at which poultry either alive or dressed is chiefly dealt in or kept or offered for sale, nor shall any person carry on, engage in or conduct the business of fishmonger or keeper of a place at which fish or shell fish or either or both of them are chiefly dealt in, without first having obtained a license as hereinafter provided.”

You will observe that this section makes no distinction between a wholesale and a retail dealer in fish. It is therefore our opinion that the section covers both wholesale and retail fish dealers.

Section 24 of the Game and Fish Act of 1915 reads as follows:

“It shall be unlawful for any person to conduct a wholesale fish market for the purpose of buying and selling and shipping fish, or as a wholesale dealer to buy and sell any fish caught or taken in the waters under the jurisdiction of this state without procuring a license so to do. Such license may be procured from the city, village or county clerk upon the payment to such city, village or county clerk of a license fee of ten (10) dollars, together with the sum of fifty (50) cents as the fee of the clerk issuing such license. Such license shall be signed, sealed and authenticated as other licenses required by this act. Each license issued under the provi-

sions of this section shall entitle the person named therein to ship any fish authorized under this act to be sold and shipped which are caught in the waters under the jurisdiction of this state during the time when it is lawful to catch such fish and to conduct a *fish market for the purpose of buying and selling for shipment fish authorized under this act to be bought and sold and which were caught in the waters under the jurisdiction of this state during the time when it is lawful to catch such fish, and to buy and sell such fish as a wholesale dealer*, until the first day of May next following its issuance, and no license shall be transferred.”

The question involved here is whether Section 1322 of the municipal code is in force as to wholesale dealers in fish since the above act went into effect, July 1, 1915.

The foregoing section was passed by the Legislature primarily to protect the game fish of the state, and covers fish caught in the waters of the state only, while Section 1322 of The Chicago Code of 1911 was passed as a health measure under authority given by Par. 50, Sec. 62, Chapter 24, Illinois Statutes (Hurd) and covers the sale of fish caught in all waters.

The most that could be claimed would be that Section 1322 is inoperative so far as it conflicts with Section 26 of the game and fish laws.

In the *City of Chicago v. Union Ice Cream Co.*, 252 Ill. 311, the Supreme Court has said, on page 313:

“The laws of the state operate within the limits of municipal corporations the same as elsewhere, unless otherwise clearly provided by municipal charters or statute. Local laws and regulations are at all times subject to the paramount authority of the Legislature. Did the Legislature intend by the passage of the Pure Food Act, in 1907, to deprive municipal authorities of all power to legislate on subjects touched upon or regulated by said act? Clearly not. Said act has certain provisions with reference to milk and its measurement, but this court has held since its passage that a municipality could regulate by ordinance the size of the bottles or jars in which milk was sold. (*City of Chicago v. Bowman Dairy Co.*, 234 Ill. 294.) There are also many provisions in said Pure Food Act with reference to food. We recently held that

a municipality could pass an ordinance regulating the sale and weight of bread. (*City of Chicago v. Schmiderer*, 243 Ill. 167.) The Pure Food Act also has regulations with reference to liquors, but no one would claim that municipalities are deprived, since the passage of that act, of any of their former authority to regulate and control the sale of intoxicating liquors. See *Gardner v. People*, 20 Ill. 431; *City of Pekin v. Smelzel*, 21 *id.* 464; *Fant v. People*, 45 *id.* 259."

From a reading of this and numerous other cases, we are of the opinion that Section 1322 of the Chicago code is still in full force and effect, notwithstanding the provisions of the Game and Fish Act of 1915.

Yours truly,

FRANK B. TEED,

Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,

Corporation Counsel.

Plumbing Firm Without Master Plumber's Name.

September 28, 1915.

MR. VERNON L. BEAN, Secretary Board of Examiners.

Dear Sir:

Your communication of August 31st, requesting an opinion concerning the right of a company or corporation to conduct a plumbing business under a name which does not include the name of the master plumber responsible for the operation of such company or corporation, has been referred to the undersigned.

The determination of this question will be one of construction placed on the words in the statute authorizing the examination of plumbers and the ordinance of the City of Chicago covering the same.

Section 1775 of The Chicago Code of 1911 provides that:

"Any person now engaged in, or hereinafter engaging in, or working at, the business of plumbing in the city, either as master plumber or employing plumber,

or as a journeyman plumber, shall obtain a certificate as to his competency to engage in such business in such manner as is hereinafter provided."

Paragraph 498 of Chapter 24 of Hurd's Revised Statutes of Illinois, 1911, provides that:

"Any person now or hereafter engaging in or working at the business of plumbing in cities or towns of five thousand inhabitants or more in this state, either as a master plumber or employing plumber or as a journeyman plumber, shall first receive a certificate thereof in accordance with the provisions of this act."

The word "person" or "persons," as well as the words referred to or importing "persons," may extend to and be applied to persons political and corporate, as well as to individuals. (Paragraph 55, Section 1, Chapter 5, Hurd's Revised Statutes of 1911.)

Section 1696 of The Chicago Code of 1911 provides that:

"Whenever any words in any section of this ordinance importing the plural numbers shall be used in describing or referring to any matters, parties or persons, any single matter, party or person shall be deemed to be included, although distributive words may not be used. And when any subject matter, party or person shall be referred to in any section of this ordinance by words importing the singular number only, or the masculine gender, several matters, parties or persons, and females as well as males, and bodies corporate shall be deemed to be included. * * *"

In the case of *Messer Company v. Rothstein*, 129 N. Y. 215, the following ordinance was construed:

"A person desiring or intending to conduct the trade, business or calling of a plumber or of plumbing in a city of this state as employing or master plumber, shall be required to submit to an examination before such examining board of plumbers as to his experience or qualifications for such trade, business or calling, and it shall not be lawful in any city of this state for a person to conduct such trade, business or calling unless he shall have first obtained a certificate of competency from such board of the city in which he conducts or proposes to conduct such business."

Section 46 provides for the registration of every employing or master plumber holding a certificate of competency:

“The appellants claimed that as a corporation cannot be examined it cannot obtain a certificate of competency and as it cannot hold a certificate of competency it cannot be registered and therefore it is unlawful for a corporation to conduct a trade, business or calling of a plumber as employing or master plumber in a city of this state.”

In this case it was held that a corporation may engage in the business of plumbing where it actually carried on work through registered plumbers. The construction statute of New York places the same construction on the word “person” as the statute in Illinois.

In the case of *Schnair v. Navarre, etc.*, 182 N. Y. 83, a firm composed of two persons in the city of New York performed work and furnished materials consisting of plumbing work for the defendant. One member of the firm was not a licensed plumber and not registered pursuant to the statute of the state and the city ordinances in regard to licensed or registered plumbers, nor was he entitled to be registered under such ordinances. His duties as a member of the firm were confined exclusively to attending to the financial affairs of the firm and keeping the books. The duties of the other member of the firm were confined to superintending and attending to the plumbing work of the firm, and he was duly registered as required. The statute in this case required that the name and address of each and every member of such copartnership shall be registered. In passing on this ordinance, Judge Gray said:

“I am clear in my opinion that the legislature cannot prevent an association of persons in a partnership from carrying on the plumbing business because some of the partners although having nothing to do with the plumbing work or its supervision are not registered as plumbers. That would be an unjustifiable interference with fundamental rights which the Constitution furnishes as a guarantee. The act required examination and registration but only as to such persons who were plumbers or who were acting as employing or

master plumber. In the present case the facts, as stipulated, are that one party exclusively attended to the plumbing part of the firm business and that the other exclusively attended to the bookkeeping and financial part of it. The law applied to the former but not to the latter. It discloses no intent and none should be presumed to impair the common law right of a person to engage in a lawful pursuit. He may contribute his capital or his clerical services to the business concern and become a partner and if not a plumber nor proposes to act as a plumber in the undertaking of the concern the act has no reference to him.”

“Master plumbers” and “employing plumbers” are one and the same,—those who do not hold themselves out as personally doing the work but as contracting to furnish the material and to do the work through others—while “journeymen plumbers” are skilled in the calling and hold themselves out as able to and willing to do the work themselves. (Volume 2, Words and Phrases, page 268. 4 Ga. App. 183.)

The construction placed on these ordinances and statutes heretofore shown indicate that the courts hold the requirements for examinations of master plumber to be personal to the men who do and supervise the work.

In the case of *Douglas v. The People*, 225 Ill. 541, the court quotes as authority the following:

“We know that important plumbing work calls for plans and designs and requires skilled supervision. It is some guarantee of these requirements being met that the plumber employed upon the particular work and who must employ plumbers and assistance in carrying out the work engaged upon is competently certified and therefore held out to be skilled and capable in his business. The layman in his ignorance is obliged to put some trust in the plumber he engages, for the plumber’s work is not only one calling for the exercise of skill but it is done in places which are dark or more or less inaccessible. The legislature in creating a system by which the qualifications of plumbers who propose to have work performed by others under their direction shall be determined, as it seems to me, aids the citizen, in an important degree, in placing his

confidence and furnishes some safeguard against the performance of bad and unsafe work.”

In the case of *Bronold v. Engler*, 194 N. Y. 323, the following facts appear:

“*Per Curiam*. The constitutionality of a statute (L. 1892, Ch. 602, Sec. 5), of which the present Section 45 of the General Cities Law (L. 1900, Ch. 327), is a substantial re-enactment, was upheld by this court in *People ex rel. Nechamcus v. Warden, etc.* (144 N. Y. 529), but subsequently an additional provision, which enacted that in the City of New York every member of a partnership carrying on the business of employing or master plumber must be a licensed plumber, was held unconstitutional, it there appearing that the unlicensed partner took no part in the conduct of the business except to furnish capital, keep the books and attend to the financial and office departments of the business. (*Schnaier v. Navarre Hotel & I. Co.*, 182 N. Y. 83.) It is under this last decision of the court that the plaintiffs claim to be exempt from the condemnation of the statute, the testimony being that they employed as manager of the business a licensed master plumber. We think there is a clear distinction between the two cases. It is not the manager but the plaintiffs who are the responsible heads of the business; not he, but they, are liable for defective work or improper plumbing. They, not he, have the continuous power to determine what journeymen plumbers shall be employed to do the work and how it shall be done, and he himself might be at any time discharged. His connection with the work depends on the continuing pleasure of the plaintiffs. We do not say that any one, not a master plumber, making a contract which provides to some extent for plumbing work, would fall within the inhibition of the statute. A builder might contract to erect and complete a house or other structure including the plumbing work for a gross sum and for that purpose he would have the right to employ a licensed master plumber to do the plumbing work. He would in such cases in no fair sense be conducting the ‘trade, business or calling’ of a master plumber. It would be the mere incident of a larger work. In this case, however, the trade of a master plumber is the very business or trade which the plaintiffs hold themselves out as pursuing and, therefore, falls within the inhibition of the statute.”

The case of C. E. Taylor Company referred to in your letter would seem to come within the provisions of this ordinance, as Mr. Taylor is holding himself out to the general public as a master or employing plumber, and it is in him that the public have to place their confidence. From the reasoning of our court in the Douglas case just cited it would seem that the court intended such cases as this should be covered by the act.

In regard to your right to notify the Health Department to withhold inspection of plumbing work done by a person or persons engaged with such company, as designated in your letter, it is my opinion that this would be the proper method to pursue, as it would effectively combat the evasion, and the Health Department would be justified in following your directions.

Yours very truly,

GEORGE A. CURRAN,
Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,
Corporation Counsel.

Status of Harbor Master and Bridge Tenders.

September 30, 1915.

HON. W. R. MOORHOUSE, Commissioner of Public Works.

Dear Sir:

In reply to your favor of recent date, you state that the office of harbor master has been established, by your written order, as a bureau of the Department of Public Works, designated as the Bureau of Rivers and Harbors, and you wish to be advised, if any action or requirement is necessary, additional to your written order, for the establishment of the Harbor Master's Office, as a separate bureau of the Department of Public Works.

You further wish to be advised if bridge tenders are

directly responsible to the harbor master, and if the matter of operation of bridges can be considered a function of the new Bureau of Rivers and Harbors, as established under the superintendence of the harbor master.

Section 1097 of The Chicago Code of 1911, provides in part as follows:

“* * * The harbor as herein defined shall be subject to the control of the harbor master, under the supervision and according to the directions of the commissioner of public works, and the use thereof shall be governed by the ordinances of the city. * * *”

Section 1100 of The Chicago Code of 1911, provides as follows:

“It shall be the duty of the harbor master to keep an office in such place as the commissioner of public works shall designate, where at all times during the season of navigation he can be found, or where orders can be left and receive prompt attention.”

Section 1101 of The Chicago Code of 1911, provides as follows:

“The vessel dispatchers, harbor masters, river police and bridge tenders shall be under the direction of the commissioner of public works, and shall perform such duties as may be prescribed for them by the rules and regulations of said department of public works and the ordinances of the city.”

Section 1106 of The Chicago Code of 1911, provides in part as follows:

“All bridges crossing the Chicago River or any of its branches, the Calumet River, or drainage canal, within the harbor of the city, including railroad bridges, shall be under the control of the harbor master, and he shall have power to order the opening and closing of the same at any time when in his judgment it is necessary to carry out the provisions of this chapter. Any bridge tender or other person in charge of any bridge within the city, who shall violate any provision of this section, shall be fined not less than ten dollars, nor more than one hundred dollars, and, on conviction, shall be immediately removed from office. * * *”

In construing the above sections, we are of the opinion, that harbor masters and bridge tenders are under the supervision and direction of the commissioner of public works, and the commissioner of public works has authority, by written order, to establish a Bureau of Rivers and Harbors with the harbor master as the official head, reporting directly to the commissioner of public works, that the operation of bridges can be classified under the head of the Bureau of Rivers and Harbors, and that the bridge tenders are directly responsible to the harbor master.

Very truly yours,

CHARLES E. PEACE,
Assistant Corporation Counsel.

Approved :

RICHARD S. FOLSOM,
Corporation Counsel.

Sunday Closing Law.

Chicago, Illinois, October 1, 1915.

HON. WM. HALE THOMPSON, Mayor of Chicago.

Dear Sir :

In reply to your request for an opinion as to the law relative to the operation of saloons, theaters and amusements on Sunday, and your duty, as mayor, in reference thereto, we respectfully submit the following :

Sections 259 and 260 of the Criminal Code of Illinois read as follows :

“Section 259. Whoever keeps open any tippling house, or place where liquor is sold or given away, upon the first day of the week, commonly called Sunday, shall be fined not exceeding \$200.

“Section 260. Sunday shall include the time from midnight to midnight.”

The Sunday Closing Law is operative in all parts of the State of Illinois, including the City of Chicago.

In the case of *People v. Busse*, 238 Ill. 593, our Supreme Court said:

“The answer filed by former Mayor Dunne, as set out in appellee’s brief, avers that said Section 259 of the state law (forbidding the sale of liquor on Sunday) is not in force in the City of Chicago. If this averment were true, it would, of necessity, dispose of this case. But it is not true. That section is the law in Chicago precisely as it is the law in all other parts of the state. The mayor of a city is charged with the execution of all laws and ordinances in force there. (Hurd’s Stat. 1908, Chap. 24, Sec. 23, p. 311.)”

In *United States v. Hrasky*, 240 Ill. 560, the court said:

“The Sunday Closing Law, so-called, is in force in all parts of this state. (*People v. Busse*, 238 Ill. 593; *Koop v. People*, 47 *id.* 327; *Kroer v. People*, 78 *id.* 294.)”

While it is the duty of the mayor to co-operate in a general way with those who seek to enforce the Sunday Closing Law, he is not the official primarily chargeable with its enforcement.

Section 10 of Art. II of the Cities and Villages Act, defines the general duties of the mayor as follows:

“He shall perform all such duties as are or may be prescribed by law or by the city ordinances, and shall take care that the laws and ordinances are faithfully executed there.”

The specific “duties prescribed by law” undoubtedly refer to those enumerated in the Cities and Villages Act. Closing saloons on Sunday is not among his enumerated duties. It can only become his duty under the general clause that he shall “take care” that the laws are executed and obeyed in his city.

The Sunday Closing Law, like the laws against murder, burglary or theft, is a part of the State Criminal Code, the general enforcement of which has been entrusted to the state’s attorney. If a murder has been committed, for instance, the mayor is not expected to prosecute the criminal, nor has he any power to punish him. The most that the mayor would be expected to do in such case would be to so exercise his authority over the city police force that they will properly

co-operate with the state's attorney or sheriff in apprehending the criminal and turning him over to the sheriff. When this has been done, the duty of the mayor ceases. He has nothing to do with the further prosecution or punishment of the criminal.

The same is true where a burglary or theft has been committed. It is not the proper function of the mayor to start the prosecution unless he happened to see the crime committed. It is the duty of any citizen who knows that the crime has been committed, to take steps to have the guilty apprehended and punished, by swearing out a warrant for his arrest, or, if the crime occurred in his presence, arrest him without a warrant. The function of the mayor in that regard is to see to it that the city police render necessary assistance when it is required.

The same is, in general, true where the Sunday Closing Law, or any other portion of our Criminal Code, has been violated. Unquestionably, it is, as a general proposition, the duty of every citizen who knows that a crime has been committed to report the same and have proceedings instituted to apprehend the criminal. Likewise, it is the duty of the mayor to "take care" that proper assistance is rendered by the police force when required.

This brings us to the question: *How much* and *what* care must the mayor take in a particular case, that the laws are executed and obeyed and that the state's attorney and sheriff receive proper assistance in the apprehension of criminals? Manifestly that must be left to the sound *discretion* of the mayor in dealing with each case. No hard and fast rule can be laid down.

In the case of *People v. Dunne*, 219 Ill. 346, and *People v. Busse*, 238 Ill. 593, both of which were petitions for a writ of mandamus to compel the Mayor of Chicago to compel the observance of the Sunday Closing Law, the Supreme Court confessed their inability to say just what the mayor should do to bring about such result. In substance, they held that that must be left to the discretion of the mayor.

In *People v. Dunne*, *supra*, the petition asked that the mayor be required by mandamus to

“secure the prosecution of every person violating the said law in said city, and to punish all violations of said law by licensed dramshop keepers in said city by the revocation of their licenses.”

Yet the Supreme Court, in an opinion by Chief Justice Cartwright (who, by the way, is reputed to be a strict churchman, in good standing, and hails from a territory where the saloon is in decided disrepute) held that they could not say as a matter of law that it was the mayor's duty to do this.

Those who desire the mayor to “close the saloons” on Sunday, usually contend that there are two ways in which he could do it:

1. By revoking the licenses of violators of the Sunday Closing Law.
2. By instituting criminal prosecution of such violators.

As to the former, the law does not make it the mayor's absolute duty to revoke licenses for any and every violation of law. It merely provides that he “*may*” revoke such license when he finds there has been violation of the law. (Dramshop Act, Sec. 4.)

The saloon licenses used in the City of Chicago also contain a condition that they are “subject to revocation by the mayor at his discretion.”

Revocation of licenses is thus clearly a matter left to the discretion of the mayor. He is certainly not required to, nor would it perhaps be equitable, to revoke a license for every violation of law, however trifling, and in determining whether violation of the Sunday Closing Law is a *trifling* or a *serious* offense, the mayor undoubtedly has the right to take into consideration public sentiment in the particular city over which he presides.

Theoretically, of course, every violation of law is serious. But in practice, it is different. The public insists on regarding certain offenses as *serious*, to be severely punished, and others as *trifling*, to be expiated by the minimum of punishment. And when the law gives a public official a *discretion* as to the nature and amount of punishment to be

meted out for a violation of a law, he has the right to regard public sentiment in fixing the punishment.

Is violation of the Sunday Closing Law such a serious offense that it ought to be punished both by the fine fixed by statute and by revocation of license by the mayor? That is a matter which must be left to the discretion of the mayor. And in exercising that discretion, public sentiment and opinion on the question are properly to be considered.

Of course, there is such a thing as an abuse of discretion. And if, after a saloonkeeper has been *repeatedly convicted* of violating the Sunday Closing Law, the mayor should fail to forfeit his license, possibly that might be regarded as an abuse of discretion. But until there has been an actual *conviction* by a court of competent jurisdiction, the mayor could never, in our opinion, be held to abuse his discretion in refusing to revoke a license simply on suspicion or accusation that the party has violated the Sunday Closing Law.

The other method by which it is said the mayor may enforce the Sunday Closing Law is by instituting prosecutions of the guilty. The mayor's power and duty in this regard, while different in *degree*, is not in its *nature* any different from that of any private citizen. The mayor has no power either to prosecute or punish. All that he can do in this regard is to cause warrants to be sworn out and the guilty to be arrested and turned over to the custody of the county official. Any private citizen can do the same. And it is the duty of every good and law-abiding citizen to do so, whenever he has knowledge that the Sunday Closing Law has been violated, or some other crime committed.

As we have seen, Sunday closing is not one of the enumerated statutory duties of the mayor. His duty in that regard is confined to a general duty to co-operate with the county officials and private citizens to secure the arrest of violators of the law. But even there he is not required to devote his energies to this matter, to the neglect or detriment of other duties.

When the police force is busy chasing burglars, thieves or murderers, the mayor is not required to order them to slacken their efforts in that regard and try to act as detectives

for the purpose of apprehending violators of the Sunday Closing Law.

Furthermore, before the mayor can be expected to use the city's police force for the detection and apprehension of violators of the Sunday Closing Law, he has a right to expect a reasonable assurance that the violators will be duly prosecuted and punished after they are turned over to the county officials and the criminal courts. Our experience with the prosecution of Sunday closing violations in Cook County do not give us much assurance of such prosecution and conviction. Former State's Attorney Healey was very active in such prosecution. But no convictions were secured. Wherefore, the state's attorney announced the policy that no further prosecutions for such offense would be undertaken until the docket had been cleared of cases of more serious nature. The state's attorney is still busy prosecuting such serious crimes. Until he is ready to prosecute the prisoners brought in, the mayor cannot reasonably be required to bring them in.

The case of *People v. Mathiessen*, 2 Ill. C. C. Rep. 333, is exactly in point. In that case the Mayor of the City of La Salle was indicted for "palpable omission of duty" in failing to enforce the Sunday Closing Law in that city. Judge Blanchard, in quashing the indictment, said:

"We are driven to the conclusion that Section 10 of Article 2, has not reference to the general laws of the state, civil or criminal, but has reference only to the laws or provisions of law found within the various articles composing the charter of the municipality, or in other words, the act entitled, 'An Act to provide for the incorporation of cities and villages,' which is a law by virtue of which the City of La Salle was organized. That law created the office of mayor and prescribed his general duties and powers. Such duties and powers are required and conferred by law, and are the laws referred to by said Section 10 of Article 2. This is manifest, when we consider the object and purpose of the law heretofore referred to providing for the incorporation of cities, etc., and it is still more manifest when we consider the sections of Article 3, preceding Section 10, wherein are defined the qualifications, duties and powers of mayors followed by Section 10, 'he shall perform all such duties

as are or may be prescribed by law or by the city ordinances, and shall take care that the laws and ordinances are faithfully executed.' If we have concluded correctly, it follows that this indictment cannot be maintained under Section 14 of Article 2 aforesaid, because the breach of duty charged is in permitting a tippling house to keep open on Sunday. No such provision can be found in the city incorporation act; no city, law or ordinance is referred to in the indictment.

"We have considered the alleged duty, which was to 'take care that the laws of the State of Illinois in the said City of La Salle were faithfully executed.' We have noticed the alleged violation of law, namely, that certain persons named were keepers of tippling houses in the City of La Salle, and kept open on Sunday; 'that said Frederick W. Mathiessen unlawfully, wilfully, knowingly and contemptuously permitted said * * * to keep open their or his tippling house on Sunday.' The indictment describes no offense within the purview of Section 14, of Article 2. The palpable omission of duty therein referred to has reference to some duty imposed by the act of incorporation or the city ordinances, or to some duty definitely prescribed by the laws of the State of Illinois.

"By what procedure shall the mayor take care that the laws of the State of Illinois against keeping open a tippling house on Sunday are faithfully executed in the City of La Salle? It will not be contended that it is his duty to personally visit the saloons on Sunday and with a strong hand close and bar the doors. If the law is violated any citizen is authorized to make complaint before a proper magistrate and have the offender tried, or make complaint to a grand jury where an investigation can be had and the offender indicted, and, on conviction, fined not exceeding \$200 for each offense. A prosecution of the offender in the manner indicated is the only way provided by law for dealing with the offender. Any person may start the machinery of the law, and the law has designated an officer called the state's attorney, and enjoined upon him the imperative duty of prosecuting indicted offenders, and, I am prepared to say of the present state's attorney that he is willing and able to discharge his duty, and that he has heretofore and quite recently been diligent in that regard. The law has not specially imposed upon the mayor as an official the duty to personally detect offenders and

enter complaint before a magistrate or grand jury. The public, of course, expect that his influence as a private citizen, and in his official capacity will be exerted in favor of law and order.

"There is no intimation that the defendant in any manner interfered, or attempted to interfere, to protect offenders from prosecutions. There is no intimation that he in any manner aided, abetted or encouraged the proprietors of tippling houses to keep open on Sunday. True, it is alleged substantially that the defendant, regardless of his duty as mayor, 'unlawfully, knowingly, wilfully and contemptuously permitted the said * * * to keep open his tippling house on Sunday.' A mayor has not power or authority to grant a permit or a privilege or a license to keep open a tippling house on Sunday. Therefore, the allegation that he permitted, etc., cannot be accepted in the sense that he issued a permit, or license or privilege, etc. The construction must be most strongly against the pleader."

For the reasons above stated, we are of the opinion: (1) that the duty of enforcing the Sunday Closing Law by means of the institution of criminal prosecutions lies not with the mayor of any city, but with the state's attorney of the county; (2) that the duty of the mayor in this respect is limited to the general duty of rendering such reasonable assistance in the detection and apprehension of violators of the law as may be necessary and consistent with his duty to give proper time and attention to his numerous other public duties; (3) that the law imposes no *duty* upon the mayor to revoke licenses for violation of the Sunday Closing Law before there has been a *conviction* by a court of competent jurisdiction, and even then, right of revocation is, to a large extent at least, discretionary with the mayor; (4) not every violation of law by the licensee is serious enough to require the revocation of his license, and the mayor is vested with the discretion of determining in each particular case whether the violation has been of a sufficiently grave character to require such drastic action as the revocation of the license.

With reference to theatres conducted properly on Sunday, it has been held, in the case of *Stevens v. Morenous*, 169 Ill. App. 282, that secular amusements on the Sabbath day

are not in themselves unlawful, except the good order and peace of society are disturbed thereby.

Sections 261 and 262 of the Criminal Code provide respectively as follows:

“Sec. 261. Whoever disturbs the peace and good order of society by labor (works of necessity and charity excepted), or by any amusement or diversion on Sunday, shall be fined not exceeding \$25. This section shall not be construed to prevent watermen and railroad companies from landing their passengers or watermen from loading and unloading their cargoes, or ferrymen from carrying over the water travelers and persons moving their families, on the first day of the week, nor to prevent the due exercise of the rights of conscience by whomever thinks proper to keep any other day as a Sabbath.

“Sec. 262. Whoever shall be guilty of any noise, rout or amusement on the first day of the week, called Sunday, whereby the peace of any private family may be disturbed, shall be fined not exceeding twenty-five dollars.”

In order to contravene this statute, in our opinion, the theatrical performance would have to create such a noise, or rout, or be such an amusement as would tend to disturb either the peace of society or any private family.

A. H. Woods Production Co. v. C. C. & L. R. R. Co.,
147 Ill. App. 568.

What has been said with respect to theatres applies with equal force to baseball played on Sunday. It should be noted, however, that this practical difference exists between the ordinary loop theatre and the baseball game—the one is entirely unlikely to disturb the peace of any private family because no such family is in the neighborhood, and the other may be in a residence neighborhood, where it would, in some instances, disturb the peace of a family.

Notwithstanding what we have previously stated in this opinion, a conviction was had and sustained against the Mayor of Granite City for his palpable omission of his official duty in wilfully and intentionally failing and neglecting to

use any effort or make any endeavor or attempt to stop gambling with slot machines in his city.

Uzzell v. The People, 173 Ill. App. 257.

In that case, Mr. Justice McBride, in delivering the majority opinion of the court, said:

"At the June term, 1910, of the City Court of Granite City, an indictment was returned against plaintiff in error, Charles A. Uzzell, the Mayor of said Granite City, which contains four counts, the first and third of which charge the defendant with a palpable omission of his official duty, and the second and fourth charge him with malconduct in the discharge of his official duties as mayor." * * *

"A motion to quash the indictment, and each count thereof, was made by the plaintiff in error, and the same having been overruled, a plea of not guilty was entered, and the trial was had and a verdict returned by the jury, finding the plaintiff in error guilty under each of the four counts of the indictment. Motions for a new trial and in arrest of judgment were overruled, and judgment rendered on the verdict, and the court imposed on plaintiff in error a fine of \$75 under each of the four counts of the indictment, and entered an order removing him from the office of Mayor of said Granite City.

"A writ of error was sued out and supersedeas granted, and the case is now before this court for review. * * *

"Section 14 provides, in case the mayor or any other municipal officer shall at any time be guilty of a palpable omission of duty, or shall wilfully and corruptly be guilty of oppression, malconduct, or malfeasance in the discharge of the duties of his office, he shall be liable to indictment in any court of competent jurisdiction, and on conviction shall be fined in a sum not exceeding \$1,000; and the court in which such conviction shall be had shall enter an order removing such officer from office.

"It would serve no good purpose to set out in full in this opinion the various counts of the indictment. After the formal part, the first count charges that the plaintiff in error, being Mayor of the City of Granite City, and having been duly elected and qualified, unlawfully did wilfully and intentionally fail and omit to perform his official duty as mayor of said city, in that he

did wilfully and intentionally fail, neglect and omit to use any effort and to make any endeavor or attempt whatever to stop gambling and the operation of slot machines, which said gambling was then and there in progress, and said slot machines then and there being operated in violation of the laws of the State of Illinois, at various places in said City of Granite City, by Fred Fuger, Harry Bricker, George Coke, Pete Radcliffe, Robert Burns, William Cool, K. A. Mitsareff, James Brittain and Steve Lovas; he, the said Charles A. Uzzell, then and there acting in his official capacity as mayor of said city, as aforesaid, and then and there well knowing that said gambling was then and there in progress, and said slot machines then and there being operated in said city, contrary to the law of the State of Illinois, also then and there well knowing that it was his official duty as mayor of said city to use all means in his power to stop said gambling and said operation of slot machines; and so the grand jurors charge that the said Charles A. Uzzell, Mayor of the City of Granite City aforesaid, in manner and form aforesaid, is guilty of a palpable omission of his official duty, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the said people of the State of Illinois. * * *

“We are therefore of the opinion that the jury were fully instructed as to the law of this case, and if they believed the witnesses for the people, they were justified in finding the defendant guilty.

“The judgment of conviction therefore is affirmed.
AFFIRMED.”

In our opinion, the Uzzell case is contrary to sound reasoning, and it does not meet with our approval. It is not decided by the Appellate Court of this district, but by the Appellate Court of the Fourth District. We think a distinction may be made between the duty to close the saloons on Sunday in Chicago and the case last referred to, based on a provision of the city ordinances, inferentially permitting saloons to remain open on Sunday under certain conditions.

Section 1526 of the Code of 1911, with reference to the contents of and conditions upon which saloon licenses are issued, reads as follows:

“1526. LICENSE—TO WHOM GRANTED—BOND.) The

mayor shall grant a license for the keeping of a saloon or dramshop within the city to any person who shall apply to him in writing therefor, and who shall furnish satisfactory evidence of good character. Each applicant shall execute to the city a bond, with at least two sureties to be approved by the city collector, in the sum of five hundred dollars (which said bond shall be in addition to the three thousand dollar bond required by the statutes of the State of Illinois); conditioned that the applicant will faithfully observe and conform to all ordinances in force at the time of the application, or thereafter passed, during the period of the license applied for, concerning or in any manner relating to the sale of intoxicating liquor, or the conduct and management of saloons or dramshops; and conditioned, further, to keep closed on Sundays all doors opening out upon any street from the bar room, or room or rooms where such saloon or dramshop is to be kept, and that all windows opening upon any street from such bar room, or room or rooms, shall on Sunday, except between the hours of 1 o'clock a. m. and 5 o'clock a. m., be provided with blinds, shutters or curtains, placed and maintained in such a manner as to obstruct the view from such street into such bar room, or room or rooms, and conditioned, further, that no window in such bar room, or room or rooms, shall be painted or covered in such a manner that between the hours of 1 o'clock a. m. and 5 o'clock a. m. of each day a clear view may not be had, from the street, through any such window into such bar room, or room or rooms. No application for a license shall be considered until the bond herein required shall have been filed."

This ordinance, and not the state law, with reference to the conduct of saloons on Sunday, has been followed in Chicago for years. Recently prosecutions have been undertaken by the state's attorney of saloonkeepers who violated the state law by keeping their places open on Sunday in accordance with this ordinance. Those prosecutions have one and all ended in acquittals.

Under these circumstances, we do not believe that the mayor is guilty of a palpable omission of duty as defined by Section 14 of Article 2 of our Cities and Villages Act, by failing to take any action with reference to causing fur-

ther evidence of violations of the Sunday Closing Law to be laid before the state's attorney, or by his failure to revoke licenses of saloons, although he may know, in a general way, that the majority of saloons in the city are kept open on Sunday.

IN CONCLUSION.

We are of the opinion that under the circumstances the Mayor of the City of Chicago ought not to be, and cannot properly be, convicted for committing a misdemeanor for failing to take any wholesale action to compel the police to attempt to enforce the Sunday Closing Law by forcibly shutting all the saloons on Sunday, nor for failing to take proceedings at the present time looking toward inducing the state's attorney to commence further prosecutions for violation of the same law.

We are further of the opinion that all saloon licenses are issued with the implication that the saloons *may* be kept open on Sunday, upon a compliance with the section of the City Code quoted above.

But the statement of our opinion as contained in these conclusions is no protection against the mayor being indicted as for a palpable omission of duty in failing to take some action to enforce the Sunday Closing Law. If such an indictment were found and stated the facts fully upon which it was based, we believe the indictment should be quashed upon motion. On the other hand, an indictment might be so drawn, following the language of the statute, as to require a trial to show the real circumstances. Upon such circumstances being shown, we believe the mayor should be acquitted, and that if he were not, the conviction would be set aside by an appellate tribunal.

The difficulty with this matter is that the mayor has no way of testing the soundness of our advice until he is indicted, and possibly tried. Assuming that the mayor wishes to carry out the will of the people of the city with reference to the enforcement of the Sunday Closing Law, the only safe way for him to act is to order the police to close the saloons on Sunday, and if this warning is not observed

by the saloonkeepers and they persistently keep open, then he may revoke their licenses, if he sees fit.

The course we have last suggested is the only one for the mayor to pursue, if he desires to ascertain the wishes of the people in this matter, without subjecting himself to the indignity of an indictment. If the majority of the voters desire the saloons kept open on Sunday, a repeal of the Sunday Closing Law should be secured from the Legislature.

The securing of a conviction is a *condition precedent* to the removal of the mayor from office. The removal follows only in case of conviction, so that if there can be no conviction, there can be no removal.

Still, in spite of our opinion that the mayor *should* not be convicted, we feel that the proper course for him to pursue, is for him to order the saloons closed on Sunday, either at once, or when his attention is specifically called to the matter by persons interested in prohibition, and, if that order is not complied with, after reasonable notice, to revoke licenses.

Very respectfully,

RICHARD S. FOLSOM,

Corporation Counsel.

Time of Passage of an Ordinance.

October 1, 1915.

HON. W. R. MOORHOUSE, Commissioner of Public Works.

Dear Sir:

The superintendent of maps referred to this department a certified copy of a street vacation ordinance presented to him as examiner of subdivisions for approval by the Chicago, Burlington & Quincy Railroad Company. He states that the ordinance was passed on July 15th, and was conditioned, among other things, upon the recording of a certified copy thereof within sixty days after passage. It seems that the mayor did not approve the said ordinance until September

10th, and the question has arisen whether the sixty days began to run from July 15th or from September 10th.

The word, "passage," as used in the ordinance in question, which provides that the company shall within sixty days "after the passage" of same, do certain things, should be construed in this instance as relating to the time when the ordinance was signed.

The authorities are conflicting on the point raised. A number of cases seem to hold that the word must be construed as referring to the time when the act or ordinance was passed by the legislative body, and not to the time when it was signed by the executive. Among these authorities may be mentioned.

U. S. v. Williams, 1 Paine 261.

Eliot v. Cranston, 10 R. I. 88.

State v. Mounts, 36 W. Va. 179.

Ex parte Lucas, 160 Mo. 218.

State v. O'Brien, 47 Ohio St. 464.

We have examined these cases closely, inasmuch as we are unable to find a decision on this point in the State of Illinois, and we are convinced from such examination that they are not grounded on as firm a basis as the large number of cases that hold otherwise. In fact, we regard the first case cited as being practically overruled by the case of *Burgess v. Salmon*, 97 U. S. 381, and some of the others seem to be inconsistent with later decisions of the same courts on similar matters.

The great weight of authority is in favor of construing the word "passage," as used in the statutes and ordinances, to mean the time at which an act is signed by the executive.

Wartman v. City of Philadelphia, 33 Pa. 202.

Johnson v. Fay, 82 Mass. 144.

Logan v. State, 50 Tenn. 442.

Rash v. Allen, 76 Atl. 370 (Del.).

Jackson v. State, 101 Ark 473.

Cordiner v. Dear, 55 Wash. 479.

Denver & R. G. R. R. Co. v. Brennaman, 45 Colo. 264.

There are also a large number of authorities which construe the word "passage" to have reference to the time when an act takes effect, among them being the following:

Rogers v. Bass, 6 Ia. 405.

Schneider v. Husse, 2 Ida. 8.

State v. Bemis, 45 Nebr. 724.

Mills v. State Board, 135 Mich. 525.

State v. Bentley, 80 Kans. 227.

It is difficult to reconcile these authorities. We believe, however, that the following excerpt from the case of *Scales v. Marshall*, 96 Tex. 140, states the rule with regard to the matter as most often construed, and in part accounts for the somewhat different views taken by the different authorities.

"The word 'passage' is used in connection with legislation in several senses. The adoption of a measure by either House is spoken of as its 'passage' through that House. The final adoption of a bill by both the House and the Senate is commonly spoken of as its 'passage.' Again, after such adoption by the Legislature, the approval of a bill by a governor is properly called its 'passage.' Where acts take effect from their 'passage,' the time of approval by the governor or of final adoption over his veto or of their becoming laws without his signature is in law called the time of their 'passage'; but, where the word is employed in an act which is finally passed at one time to take effect at a later time, it may by reason of a somewhat common usage be taken as referring to the latter date, unless such a construction is contrary to the intention appearing from the whole statute." *Scales v. Marshall*, 70 S. W. 945, 946, 96 Tex. 140."

In coming to the conclusion that it would be proper to regard such ordinances as passed at the time they are signed by the mayor, we have in mind that the City Council passes a large number of ordinances which conclude with a section stating that they become effective from and after their passage. Unless the word is construed as we have indicated, such ordinances would have to be regarded as incorrectly stating the time when they take effect.

We believe, therefore, that it would be entirely consist-

ent to regard the use of the word "passage" in the ordinance under consideration as conveying the same meaning as in the ordinances that we speak of as so frequently passed by the City Council.

We return herewith the certified copy submitted by the superintendent of maps.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,
Corporation Counsel.

Liability of City with Respect to Thefts from Lockers at Bathing Beaches.

October 1, 1915.

HON. WALTER WRIGHT, Secretary, Special Park Commission.

Dear Sir:

In reply to your favor of recent date transmitting statement of claim of Mr. Gilbert L. Carroll, together with a report of Mr. E. J. O'Hara, Director of the 51st Street Municipal Bathing Beach, it appears from the claimant's statement and the enclosed report that a number of men and boys were standing in line waiting for a vacant locker. Presently one locker was vacated. The first man in line volunteered to share the locker with the second man in line. The claimant, who is the same man that volunteered and did share his locker with another person, now files a claim against the city for damages resulting from the loss of his wearing apparel, which was stolen from this locker at the 51st Street Municipal Bathing Beach. You now wish to be advised if the city is liable in this matter.

Municipal bathing beaches are maintained and conducted gratuitously by the city for the good of the public welfare. Bathing suits and lockers are furnished free to the public. It may be said that a municipal corporation is under

no obligation to provide a locker for each and every person that might desire one. There was no negligence on the part of the city. It did everything reasonable in the exercise of its duties for the care and safety of the property of the claimant, and, having performed said duties, it has done all that can be required of it, as the city is not an insurer of the safe return of property left in its lockers.

The claimant certainly did not exercise due care and skill when he volunteered to share his locker with a stranger, and should not ask damages from the city when the loss was caused by his own negligence. From the statement of facts, it is plainly shown that there was no negligence on the part of the city or its employe in conducting the bathing beach, nor was it the negligence of the city that caused the loss of the wearing apparel of the claimant, and, therefore, we are of the opinion that the city is not liable.

Yours very truly,

CHARLES E. PEACE,
Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,
Corporation Counsel.

Lien of Sub-Contractor on Public Improvement.

October 4, 1915.

MR. E. F. RENNACKER, President, Rennacker Construction Co.

Dear Sir:

We have your letter of September 30th requesting that certain moneys due you under a contract for paving 56th street, and held by the city comptroller on written notice of lien by the Federal Furnace Company and John Zeder, sub-contractors, be released and turned over to you, and in reply will say:

Section 23 of the present mechanics' lien law, which creates the right to a lien for work done or material furnished for public improvements, provides in part as follows:

“Provided, such person shall, before payment or delivery thereof is made to such contractor, notify the officials of the state, county, township, city or municipality whose duty it is to pay such contractor of his claim by a written notice. It shall be the duty of such official so notified to withhold a sufficient amount to pay such claim until it is admitted, or by law established.
* * *”

Section 24 of “An Act to revise the law in relation to mechanics’ liens,” in force June 26, 1895, is identical in all essential respects to Section 23 of the present act.

In construing Section 24 of the Act of 1895, the Supreme Court says, in the case of *National Bank of La Crosse v. Peterson*, 200 Ill. 218:

“Said Section 24 provides that any officer who shall fail to withhold a sufficient amount to pay claims for which written notice had been given him as required by the section, shall be liable on his official bond to the person serving such notice, for the damages resulting from such failure, which damages may be recovered in an action at law in any court having competent jurisdiction. The contention of the appellant in the court below was and in this court is, that said Section 24 creates a right which did not before exist, and provides a remedy for the enforcement of the right by an action at law on the official bond of the officer who has failed to comply with his duty under the section, and that, according to a familiar rule of statutory construction, the remedy so provided is exclusive, and that a negation of any other remedy is conclusively implied. The error of this position is that said Section 24 does not provide a remedy for the enforcement of the lien which is created by the provisions of the section. The provisions of Sections 9, 25 and 29 of the Lien Act, and other sections of the act relating to the remedies for the enforcement of liens, do not apply to the lien created by Section 24 of said act, but only to the enforcement of liens against real estate. Section 24 creates the right to a lien, provides the method by which a lien may be established, but does not attempt to provide any remedy for the enforcement of the lien. Liens established by statute may be enforced by bill in chancery if the statute has provided no other remedy. *Cairo and Vincennes Railroad Co. v. Fackney*, 78 Ill. 116; 19 Am. & Eng. Ency. of Law, (2d Ed.) 35.

“The ordinary actions at law furnish no remedy for the enforcement of the lien given by this statute. Compliance with the provisions of the statute in question upon the part of the person seeking the lien entitles such person to the lien, and the officers of a city or municipality cannot deprive such person of the benefit of his lien by failing to withhold the bonds or vouchers.”

The case of *West Chicago Park Commissioners v. Granite Co.*, 200 Ill. 527, was a case in which appellant, West Chicago Park Commissioners, paid Sargent, the contractor, after notice of lien had been served upon it by Granite Co., appellee. The court says, at page 534:

“The payments of money to Sargent were payments by appellant when it had no legal right to pay him, and no one would think that if money due to one had been paid to another the party lawfully entitled to it could not recover because of such payment.”

From these authorities, we are compelled to hold that the city comptroller cannot legally pay the money due under the said contract until the claims for liens have been adjudicated either by agreement or judicial proceedings. Where the lien claimant refuses to bring suit to enforce his lien, your remedy would appear to be to file a bill in chancery for the removal of the lien, because the court holds, in *National Bank of La Crosse v. Petterson*, that the sections of the Mechanics' Lien Act relating to enforcement and limitation do not apply to liens created under Section 24 of the Act of 1895.

Very respectfully,

EDWARD H. WRIGHT,
Assistant Corporation Counsel.

Approved:

CHARLES M. HAFT,
First Assistant Corporation Counsel.

Withdrawal of Consent of Signers of Petition.

October 5, 1915.

HON. W. R. MOORHOUSE, Commissioner of Public Works.

Dear Sir:

The communication of Mr. Walter G. Leininger, Superintendent of Streets, under date of October 2, 1915, together with attached exhibits of petitions and letters asking to be advised of the proper action in the matter of an application for permit for the removal of certain frame buildings where certain of the signers to the petition in said application giving the necessary frontage consents have advised, by letter, their withdrawal of such consent, and which withdrawal of consent, if recognized will reduce the frontage consents in said application below that legally required for the issuance of the permit, has been referred to me.

The Supreme Court of our state in its opinion in the case of *Theurer v. The People*, 211 Ill. 296, says:

“The right of a petitioner to withdraw his name from a petition at any time prior to the time the tribunal created by law to pass upon and determine the proposition submitted by the petition has finally acted is settled by this court in *Littell v. Board of Supervisors*, 198 Ill. 205.”

And the court then, quoting from its former decision, says:

“the act of signing such petition is not an irrevocable act, and that it may be revoked at any time before the jurisdiction of the body authorized to act has been determined by it.”

Theurer v. The People, 211 Ill. 296-303.

It appears from your communication and the exhibit of letters attached, that on September 20, 1915, you were advised of the withdrawal of certain of the petitioners' consents to the issuance of the permit; that upon that date final action had not been taken in the matter of the application for the permit; that recognition of the said withdrawals reduces

the frontage consents on said application below that legally required.

We therefore advise that the permit may not legally issue until the legally required frontage consents are filed.

You state also that contention is made by the applicant that there is not authority for the agency exercised in the withdrawal of consent by the corporations Aurora, Elgin & Chicago Railroad Company and the Board of Education of Chicago. The name of the corporation Aurora, Elgin & Chicago Railroad Company is signed to said petition "By C. J. Jones, Supt. of Transportation." The advice of the withdrawal appears on the letterhead of said corporation and is signed by "Edwin C. Faber, Vice President and General Manager." It is plain that the warrant of assumption of the agency of Mr. Faber is as sound as is that for the agency of Mr. Jones. The advice of the withdrawal of the consent of the Board of Education appears on the letterhead of said corporation and is signed by "L. E. Larson, Secretary." The law presumes the regularity of Mr. Larson's act as a public official, and the burden of establishing the irregularity thereof rests upon him who asserts it.

Very truly yours,

JAMES DONAHOE,

Assistant Corporation Counsel.

Approved:

CHARLES M. HAFT,

First Assistant Corporation Counsel.

Right of Bankrupt to Demand Telephone Service.

October 5, 1915.

HON. JOHN P. GARNER, Commissioner of Public Service.

Dear Sir:

Your letter of recent date, *In re* complaint of Packenham & Muldner, 154 W. Washington street, who have applied for telephone service, Class M12, under Mr. Muldner's name, has been referred to me for an opinion.

In answer to the section of your letter numbered 1, I believe that the discharge of Mr. Muldner in bankruptcy, wherein he scheduled but half of his debt to the Chicago Telephone Company, is sufficient to estop the telephone company at this time from denying him the right to be furnished service because of their claim that he still owes them an indebtedness. In support thereof, I cite "Loveland on Bankruptcy," page 839, paragraph 292, wherein it is stated, as follows:

"A discharge will not release a bankrupt from debts which have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, *unless* such creditor had notice or actual knowledge of the proceedings in bankruptcy."

Birkett v. Columbia Bank, 195 U. S. 345.

12 Am. Bankruptcy Reports, 601.

In re Monroe, 114 Fed. Rep. 398.

"When the court has jurisdiction and the claims have been placed upon the schedule or if omitted from it and the creditors have had notice or actual knowledge of the proceedings the debt, if provable, is released by the discharge."

Zimmermann v. Ketchum, 66 Kan. 98.

11 Am. Bank. Rep. 190.

In answer to your question numbered 2, as to what would constitute legal notice and publication to the creditor, the Bankruptcy Act is sufficient answer to that question:

"NOTICE TO CREDITORS.

"(a) Creditors shall have at least ten days' notice by mail, to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors, unless they waive notice in writing * * *."

In answer to your question numbered 3, as to whether or not there can be any discrimination between subscribers, or whether because a person was adjudged a bankrupt he could be discriminated against by the telephone company, I beg to state that it is my opinion that he can not.

The Ordinance of May 26, 1913, is amendatory of the Ordinance of November 6, 1907, as is stated therein in the first paragraph and in Section 7 thereof. Neither the amendatory ordinance nor the original make reference to a deposit of any kind required to be paid by a subscriber at the time of making application for telephone service. The matter of a deposit is one adopted by rule of the telephone company and would be sustained by the courts if reasonable, and has been so held in many instances.

Public service companies may prescribe reasonable rules and regulations for the government and conduct of their business, and such rules and regulations will be recognized by the courts.

In *Williams v. The Mutual Gas Company*, 52 Mich. 499, the right of the company to insist upon a deposit to protect it against loss from furnishing gas to a hotel was sustained as a reasonable regulation.

In *Shepard v. The Milwaukee Gas Light Company*, 6 Wis. 326, the right of the company to demand security for gas consumed or a deposit of money to secure the payment thereof was held to be just and necessary to guard against loss.

In the Ordinance of November 6, 1907, Section 6 thereof fixes the maximum rates, service and equipment, and is the only place in the ordinance or the amendments thereof that has any bearing upon the matter of discrimination. It provides, as follows:

“Said Chicago Telephone Company during the term of this ordinance shall furnish upon demand telephone service of any of the classes or kinds mentioned in this section, in the City of Chicago, ‘without discrimination, at the same rates,’ to all persons, firms and corporations who shall elect to take or use any of such classes or kinds of service, and shall not charge its present or future lessees, subscribers or patrons within the City of Chicago rates for telephone service under yearly contracts payable monthly in excess of the following maximum rates: * * *.”

It is apparent from this last quoted section that there can be no discrimination between persons, firms or corporations who are using a particular class or kind of service,

though it is my opinion that there can be discrimination between the various classes and kinds of service. It is also apparent from the foregoing that Mr. Muldner should be furnished service by the Chicago Telephone Company on the same basis as any other subscriber to the particular class of service that he desires.

Very truly yours,

DANIEL A. ROBERTS,
Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,
Corporation Counsel.

Liability of Railroad Company to Repair Approach to Viaduct.

October 6, 1915.

HON. WALTER C. LENINGER, Superintendent of Streets:

Dear Sir:

Replying to your inquiry concerning the liability of railroad companies to repair the approach to the Sangamon street viaduct, we advise you that the liability of a railroad company to perform the work in question is predicated upon the fact that its tracks cross a street at grade and the propulsion of frequent and rapidly moving trains across such public highway endangers public safety and life and is a consequent nuisance, and the law imposes upon the railroad company occasioning the nuisance the duty of eliminating it. Such elimination is produced by separating the grade of the street from that of the railroad, and, under the familiar rule that the burden of eliminating a nuisance is imposed upon the person creating it, the railroads whose tracks lie beneath the viaduct, of which the approach in question is a part, are obligated to construct the viaduct in the first instance and to maintain it in the second instance.

City v. P. P. C. & St. L. R. R. Co., 146 Ill. App. 403.

There may be some contention that by virtue of the terms of a track elevation ordinance the companies are excused from obedience to any governmental regulation pertaining to this subject, but any such contention is without foundation.

City v. Chicago Union Traction Company, 199 Ill. 259.

Northern Pacific Railway v. State, 208 U. S. 583-597.

Very truly yours,

CHARLES M. HAFT,

First Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,

Corporation Counsel.

Brewery Corporation as Surety on Dramshop License Bond.

October 6, 1915.

HON. CHARLES J. FORSBERG, City Collector, Chicago.

Dear Sir:

Answering your verbal inquiry of Monday as to whether or not a brewery corporation would be allowed to act as the surety on a dramshop bond required by Section 5, Chapter 43, Illinois Statutes, and Section 1526 of The Chicago Code of 1911, the bond being signed by the corporation as a means of furthering its business and as a consideration for the exclusive sale of its produce in the dramshop in question by the keeper thereof, allow us to state:

Corporations possess such powers and such only as are conferred upon them by the law of their creation, but implied powers are presumed to exist in order to allow such bodies to carry out the express powers granted and to accomplish the purposes of their creation.

Many acts may be suggested, which though beneficial to the business of a corporation, are too remote from its general purposes to be deemed reasonably within its implied powers. What is and what is not too remote must be deter-

mined according to the facts in each case. In exercising powers conferred by its charter, a corporation may adopt any proper and convenient means tending directly to their accomplishment not amounting to a transaction of a separate and unauthorized business.

The contract of suretyship as involved in the foregoing case would not be illegal in the sense that it was forbidden by the statute or that it was against public policy. It is *ultra vires*, if at all, simply because it does not relate to something within the purview of the objects for which the corporation was organized. A corporation of this character has the right to foster its business by all the usual and proper means, and it may make all contracts which are useful or necessary to enable it to carry on the business or accomplish the objects of its incorporation.

In *Best Brewing Co. v. Klassen*, 185 Ill. 37, which was a suit on appeal bond signed by a brewing corporation in a forcible detainer suit, the court said at page 40:

“*Prima facie* the signing by the company of an appeal bond in such a suit was an act beyond the purpose for which it was organized, and consequently illegal. If it had been shown that it was executed clearly for the purpose of prompting or protecting its own business of brewing or selling beer, etc.—that is to say, if the act had been reasonably necessary to accomplish the end for which the corporation was formed,—it would have been within the scope of the corporate power.”

In *Timm v. Grand Rapids Brewing Co.*, 125 N. W. Rep. 357, which was a case involving the rights of a brewing corporation to become surety upon the bond of a saloonkeeper in consideration of his agreement to sell the brewery's beer, the court said:

“The purpose for which the ‘Brewing Co.’ was organized was stated in its articles to be ‘the manufacture and sale of malt and all kinds of malt and fermented liquors and aerated and charged waters.’ Under the well settled rule the defendant had implied power to do those things necessary and helpful to the conduct of its authorized business. It could itself engage in the sale at retail of its product in as many places as it

might desire, and therefore might contract with its own sureties requisite to such business, and in our opinion it might also render assistance to purchasers of its product in furtherance of a contract for such purpose.”

In *Horst v. Lewis*, 71 Nebr. 365, which was an action to recover damages from a dramshop keeper and his sureties for having caused the death of plaintiff’s husband by furnishing him alcoholic drinks, the court said at page 378:

“The execution of the bond resulted in a demand for the use of the building, opened up an avenue for the sale of its products, and brought in additional revenues to the corporation. It was manifestly for the purpose of furthering its business, and accomplishing the objects of its incorporation, as indicated by its articles, that it obligated itself as surety on the bond of its principal, and that these results naturally flowed from the action taken is abundantly proved by the evidence in the record. As is said in the former opinion, *ante*, p. 365: ‘It thus clearly appears, as it seems to us, that the transaction above recited, in so far as it consisted of the leasing of the building and in securing a contract for the retailing of beer, was within the express terms of the charter, and that the execution of the bond was, under the circumstances, a necessary incident thereto.’ ”

In *Kraft v. West Side Brewery Co.*, 219 Ill. 205, the brewery loaned Kraft money to erect a building for his saloon with living apartments for the owner and a hall in the upper story. The brewery was given a lease upon the premises and no other beer than that manufactured by it was to be sold on the premises during the terms of the lease. A mortgage was given to secure payment of the loan, and when proceedings were instituted to foreclose the mortgage the defense of *ultra vires* was interposed. The court said, at page 207:

“We are of the opinion that the loan in this case was within the implied powers of appellee, and made for a purpose not too remotely connected with the promotion of its business to be within the rule laid down in *Central Lumber Co. v. Keller*, *supra*. The reason for making the loan can under no construction of the facts be held to have been for the purpose usually in view in making real estate loans—that is, safe security at a satisfactory rate of interest. The testimony of appellant

shows that he was the owner of a lot advantageously located for a saloon and hall, and that appellee solicited him to put the same to that use, and agreed to furnish the funds for the erection of the desired building provided it was given the exclusive sale therein of the beer of its manufacture. We are of the opinion that the appellee's motive was clearly to extend the sale of its product and not to engage in the business of loaning money, and that such would be a legitimate result of the transaction, and this being its purpose, the making of said loan cannot be held to have been *ultra vires*."

While this proposition has never been passed on directly by our courts, in view of the inference that may be drawn from what the Supreme Court said in the Klassen and Kraft cases cited, and taking into consideration the further fact that the Supreme Court in the Timm and Horst cases, also cited above, has passed squarely in favor of the proposition, it would seem that, if the questions were presented, the courts of this state would hold that the signing of a dram-shop keeper's bond by a brewery corporation under the conditions above set out would be within the implied powers of the corporation and would not be *ultra vires*, if it was a condition of the signing of the bond that the licensee should use the brewery company's beer during the license period for which the bond was issued.

Respectfully submitted,

FRANK B. TEED,

Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,

Corporation Counsel.

Ordinance Concerning Handling of Insane People.

October 7, 1915.

MRS. LOUISE OSBORNE ROWE, Commissioner of Public Welfare.
Dear Madam:

We are in receipt of your letter of September 30, 1915,
In re ordinance covering the handling of insane people.

The care and detention of insane people is governed by the statute. Section 2 of Chapter 85 of Hurd's Revised Statutes of Illinois, provides:

"§ 2. NOT RESTRAINED OF LIBERTY.) Except as hereinafter provided, from and after the passage of this act no insane person or persons supposed to be insane, but who shall not have been legally adjudged to be insane, shall by reason of his insanity or supposed insanity, be restrained of his liberty: Provided, that this section shall not be construed to forbid the temporary detention of an alleged lunatic for a reasonable time, not exceeding ten days pending a judicial investigation of his mental condition."

Section 3 of Chapter 85, provides:

"PROCEEDINGS FOR SUPPOSED INSANITY. STATEMENT.) When any person shall be or be supposed to be insane, any reputable citizen of the county in which such patient resides or is found, may file with the clerk of the County Court of said county a statement in writing under oath, setting forth that the person named is insane and unsafe to be at large, or suffering under mental derangement, and that the welfare of himself or others requires his restraint or commitment to some hospital or asylum for the insane. The said statement must be accompanied by the names of the witnesses (one of whom at least must be a physician having personal knowledge of the case) by whom the truth of the allegations therein contained must be substantiated and proved: Provided, that when it shall appear by such statement the person alleged to be insane has not been examined by a physician, the judge may appoint a qualified physician of the county to make such examination and allow him compensation therefor not exceeding five dollars (\$5), which shall be taxed and collected as is herein provided in respect to other costs in proceedings in inquest of lunacy."

Section 4 of Chapter 85, provides:

"COUNTY JUDGE TO ISSUE WRIT—HEARING.) Upon the filing of the statement aforesaid, unless the person alleged to be insane shall be brought before the court without a writ, or unless an affidavit of some credible person shall be filed setting forth that, in the opinion of the affiant, the physical or mental condition of the said person is such (stating the same) as to render it manifestly improper that such person be brought before the

court, the judge of the county shall direct the clerk to issue a writ directed to the sheriff or to any constable or to the person having custody or charge of the person alleged to be insane, commanding said person to be brought before the court at such time and place as the judge may appoint for the hearing and determining of the matter; and in no case shall such hearing take place until the person alleged to be insane shall have been notified as the court shall direct."

The foregoing provisions of the statute govern the care of insane persons.

Section 1176 of The Chicago Code of 1911, provides as follows:

"§ 1176. POLICE CASES—EXAMINATION OF.) Said city physician shall, when directed by the general superintendent of police or any police officer having charge thereof, visit any station and examine and make provision for the care of all persons therein found to be sick, injured or insane; and when directed by the general superintendent of police or by any police officer having charge of any police station or by any judge of the Municipal Court, he shall examine cases of rape or indecent assault and report the result of such examination to the person directing such examination."

Section 1176 of the code makes provision for the examination of insane persons picked up by the police. In addition to the city physician and assistants, the police department has, as a part of the department, the ambulance surgeons. There are ten stations throughout Chicago in which these ambulance surgeons are located. They are so located that they can reach any point in Chicago within a very short time. The examination of insane persons can be made by these physicians by order of the general superintendent of police.

An order by the general superintendent of police directing the examination of these patients when the city physician cannot be had or reached within a reasonable time, would, we think, be the best manner or best method that could be adopted to meet the ends that you wish to attain.

The general superintendent of police has power to promulgate all rules for the regulation of the members of

his department. The handling of insane persons picked up by the police is a departmental rule and can be taken care of by orders from the general superintendent of police.

We would advise you, therefore, to take this matter up with the general superintendent of police and have him make the necessary rules for the guidance of the members of his department in regard thereto as herein suggested.

Yours respectfully,

GEORGE A. CURRAN,
Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,
Corporation Counsel.

Interpretation of Pension Fund Law.

October 8, 1915.

TO THE BOARD OF TRUSTEES OF THE POLICE PENSION
FUND OF CHICAGO.

Gentlemen:

We are in receipt of your request for an opinion upon the application for a pension filed by Michael Wleklinski.

It appears from an examination of the said application that the applicant joined the police department on March 31, 1890, and served continuously until December 1, 1910, when he tendered his resignation, after completing a service of twenty years and eight months. At the time of his retirement from the police department he was 45 years of age. His application for a pension was filed on September 4, 1915.

Section 3 of the Police Pension Fund Act of 1887, in force and effect in 1910 when the said applicant resigned from the police department, provides in part as follows:

“Whenever any person, at the time of the taking effect of said act, to which this is an amendment, or thereafter, shall be duly appointed and sworn and

have served for a period of twenty years or more upon the regularly constituted police force of such city, village or town of this state, subject to the provisions of this act, or where the combined years of service of any person upon the police force and fire department, as aforesaid, of such city, village or town, shall aggregate twenty years or more, *said board shall order and direct that such person, after becoming fifty years of age and his service on such police force shall have ceased*, shall be paid a yearly pension equal to one-half the amount of salary attached to the rank which he may have held on said police force for one year immediately prior to the time of such retirement: Provided, however, the maximum of said pension shall not exceed the sum of \$900.00, and the minimum be not less than \$600.00 per annum."

The Legislature in 1911 amended the above section by removing the fifty year age limit required before a policeman could collect his pension. The Police Pension Fund Act was originally passed and became effective on July 1, 1887, and the main provisions of Section 3 of the said act have not been substantially changed by any of the subsequent amendments.

The application of the said Michael Wleklinski for a pension will have to be controlled by the law in force and effect on the date he resigned from the department. You will observe from reading Section 3 of the act in force and effect in 1910 that it provides "that whenever any person, at the time of the taking effect of said act, to which this is an amendment, or thereafter, shall be duly appointed and sworn and shall have served for a period of twenty years or more upon the regularly constituted police force of such city, village or town of this state, subject to the provisions of this act * * *, said board shall order and direct that such person, after becoming fifty years of age and his service on such police force shall have ceased, shall be paid a yearly pension * * *."

The applicant here in question completed a service of twenty years and eight months when his resignation was tendered and accepted, on the first day of December, 1910, and he then had reached the age of 45 years. The law

at that time made no provision for pensioners filing applications for a pension; it simply provided that when any person completed a service of twenty years on the police force, or where the combined service in the police and fire departments amounted to twenty years, that such board should order and direct that such person, after becoming fifty years of age and his service on the police force shall have ceased, he shall be paid a yearly pension.

Under the statute in force when this applicant resigned, he could not compel the payment of a pension to him until he was fifty years of age. The General Assembly of 1911 removed the age limit and he was no longer required to wait until he attained the age of fifty years before applying for a pension.

We beg to advise your board that we believe that the law in force and effect in 1910, the time when this applicant resigned from the police force, was such that it required your board, after the resignation of the applicant, to order and direct that he be paid a yearly pension equal to one-half of the amount of salary attached to the rank he held in the police department one year prior to his resignation, the payment of the said pension to commence when he reached the age of fifty years.

We also beg to advise you that the applicant herein had the right to apply to the Police Pension Board in 1911 for a pension, and under the law then in force and effect it was the duty of the board (the applicant having completed a service of over twenty years in the police department) to grant him a pension, with the reservation that the payment of the same was not to commence until he had reached the age of fifty years. We can not hold, as a matter of law, that this applicant, after having completed the required time of service in the department, is not entitled to a pension under Section 3 of the Police Pension Fund Act of 1887 on account of having resigned from the department at the age of forty-five years. The statute did not require the applicant to remain in active service on the police force until he reached the age of fifty years.

Section 3 of the Police Pension Fund Act is a statute remedial in character, and when its application is sought to be applied to policemen who have served twenty years or more on the police force and who desire to take advantage of its provisions, it should and must be liberally construed.

The statute expressly confers power on your board, where the applicant has served for a period of twenty years or more, to order and direct that such person, after becoming fifty years of age and his services on the police force shall have ceased, to be paid a pension. The only change in the law then in force and effect and the law now in force and effect, so far as it is applicable to this applicant, is that the fifty year age limit has been removed.

We beg to advise your board that the Police Pension Fund Act of 1887, or any subsequent amendment, is not repealed by the act of 1915. The act of 1915 expressly provides that it shall supersede the act of 1887, and provides in Section 12 thereof that "all persons, who, upon the taking effect of this act, are entitled to or receiving pensions under an act entitled 'An Act to provide for the setting apart, formation and disbursement of a police pension fund in cities, villages and incorporated towns' (approved April 29, 1887, in force July 1, 1887), as subsequently amended, shall receive no further payment under said act, but shall in lieu thereof be entitled to the benefits provided for in this act, the intention being that this act, in cities within its terms, shall supersede the aforesaid act * * *."

Section 3 of the Police Pension Fund Act of 1887 was amended in 1911 and provides as follows:

"Whenever any person *shall have been* or *shall* hereafter be appointed and sworn either as a probationary or regular policeman, and shall have served for a period of twenty years or more in the police department of such city, village or town of this state, subject to the provisions of this act, * * * said board shall order and direct that such person, after his service in such police department shall have ceased, shall be paid a yearly pension."

We beg to advise your board that the above statute was intended by the Legislature to be retroactive and to embrace within its provisions any person appointed and sworn as a policeman prior to its enactment, and when such policeman completed a service of twenty years in the police department, either prior or subsequent to July 1, 1911, he is legally entitled to a pension.

Section 2 of Paragraph 400 of the amended act of 1911 provides as follows:

“All acts or parts of acts or amendments thereof heretofore enacted, and in any manner conflicting with the provisions of this act, are hereby expressly repealed.”

We beg to inform you that the only part of Section 3 of the Act of 1887 that conflicted in any way with the amended Act of 1911, in so far as said section is applicable to the application here in question, was the condition that policemen should reach the age of fifty years before being entitled to draw a pension, and that that provision has been repealed by the amendment of 1911.

Article II of Section 2 of Chapter 131 of the Revised Statutes of 1911 provides as follows:

“The provisions of any statute so far as they are the same as those of any prior statute shall be construed as a continuation of such prior provisions and not as a new enactment.

“Unless contrary to manifest intention of the Legislature or clearly repugnant to the context of the act rights accruing under an old law which has been revised are saved.”

Merlo v. Johnston City & Big Muddy Coal Company, 258 Ill. 329.

We are, therefore, of the opinion that the said applicant, Michael Wleklinski, is entitled to a pension, that your board possesses the necessary power to entertain his application at this time and to act thereon.

Respectfully submitted,

JAMES W. BREEN,
Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,
Corporation Counsel.

Refund of License Fee.

October 11, 1915.

HON. OTTO KERNER, Alderman, 12th Ward.

Dear Sir:

In response to your verbal request regarding a petition for a refund now pending before the Finance Committee of the City Council on behalf of Abraham Silverman, allow us to state:

The facts as we understand them are as follows:

The petitioner opened up a junk shop at 1611 Blue Island avenue. Having failed to secure a license he was arrested, and, as a defense, contended that he was operating a wholesale junk yard which did not require a license. During the pendency of this suit he secured a license and the suit was dismissed. It subsequently appeared that number 1611 Blue Island avenue was located within 400 feet of a church, and this license was revoked.

Section 1516 of The Chicago Code of 1911, provides in part as follows:

"In no event shall any rebate or refund be made of any license fee or part thereof by reason of the death of the licensee, or by reason of non-user of such license, or by reason of a change of location or occupation of such license."

The above question has been before this department very frequently, and, in an opinion to the comptroller, dated December 19, 1913, it was said:

"In the various opinions heretofore rendered to your department we have held that money voluntarily paid to a municipality for license fees can not be recovered."

In a recent decision of our Supreme Court in the cause known as *Illinois Glass Co. v. Chicago Telephone Co.*, 234 Ill. 535, it is said at page 541:

"It has been a universally recognized rule that money voluntarily paid under a claim of right to the

payment and with knowledge of the facts by the person making the payment cannot be recovered back on the ground that the claim was illegal. It has been deemed necessary not only to show that the claim asserted was unlawful, but also that the payment was not voluntary; that there was some necessity which amounted to compulsion, and payment was made under the influence of such compulsion."

It occurs to us that the sections heretofore quoted prevent the return of this money.

Yours very truly,

FRANK B. TEED,

Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,

Corporation Counsel.

Notice of Lien by Sub-Contractors.

October 11, 1915.

HON. CHARLES H. SERGEL, City Treasurer.

Dear Sir:

Your letter of October 7th, addressed to the corporation counsel, requesting an opinion as to the legal value of notice of lien by sub-contractors or others who have furnished material to contractors, filed subsequent to the delivery of the special assessment voucher by the city comptroller but previous to the issuing of a warrant in payment of such voucher, has been referred to me for reply, and in answer thereto would say:

Liens for work done or material furnished for public improvements are created by Section 23 of the present Mechanics' Lien Law, which is identical in all essential respects with Section 24 of "An Act to revise the law in relation to mechanics liens," in force June 26, 1895, and provides in part as follows:

"Provided such person shall, before payment or

delivery thereof is made to such contractor, notify the officials of the state, county, township, city or municipality, whose duty it is to pay such contractor, of his claim by a written notice. It shall be the duty of such official so notified to withhold a sufficient amount to pay such claim until it is admitted, or by law established."

The method of payment of contractors for work done on public improvements, and the rights of holders of vouchers and bonds issued in payment for such work are prescribed by Sections 86, 87, 88, 89, 90, 91 and 92 of "An Act concerning local improvements," approved June 14, 1897, in force July 1, 1897, as amended. Section 86 of the act sets out a form of bond that may be used and provides that "said bond may have coupons attached to represent the interest to accrue thereon." (As amended by act approved and in force May 9, 1901.)

The Chicago City Council has provided by ordinance for the exercise of the power granted by the Act Concerning Local Improvements whenever payments for such improvements are to be made in bonds.

Section 55 of The Chicago Code of 1911 is as follows:

"MANNER OF EXECUTION—COUPONS—FORM). Whenever the corporate authorities of the city shall provide by ordinance for the issuance of improvement bonds for the purpose of anticipating the collection of special assessments heretofore levied or hereafter to be levied, in pursuance of the provisions of the statutes of the state of Illinois, such bonds shall be lithographed or steel-engraved on the best quality of heavy bond paper, of a design to be approved by the mayor, and shall be signed by the mayor, and by the president of the board of local improvements, countersigned by the comptroller, and attested by the city clerk.

"Coupons shall be attached to said bonds, which shall bear the facsimile signature of the city comptroller, and shall be in substantially the following form:
"Coupon No..... \$.....

The City of Chicago, Illinois, promises to pay bearer at the office of the city treasurer, in said city, on the.....day of.....19....., the sum of dollars, being the annual interest on improved bond No..... Series No...., dated

....., issued in anticipation of the collection of the deferred installment of special assessment No., named in said bond, said sum to be paid solely out of the said installment when collected.

City Comptroller.

“Each bond shall have its amount printed or lithographed across the face thereof in large figures.”

Section 88 of the statute above referred to provides that:

“Payment for any improvement done or performed under the provisions of this act, to be paid for out of any special assessment or special tax levied in installments, as herein provided, may be made in the bonds herein provided for; and the first installment thereof shall be paid to the person or persons entitled thereto on the contract for said work. * * *

“If such first installment is not collected when payments fall due, vouchers therefor may be issued, payable out of the first installment when collected. Such vouchers shall bear no interest and shall be paid from said installment when collected.” (As amended by act of 1901.)

Section 90 of said act contains this clause:

“Any holder of vouchers or bonds, or *their assigns*, shall be entitled to summary relief by way of mandamus, or injunction to enforce the provisions hereof.”

(As amended by act of 1901.)

Whether notice of lien on the city treasurer would entitle a sub-contractor to a lien after a “voucher” has been issued by the city comptroller depends upon whether or not the delivery of the voucher is a legal payment and delivery on behalf of the city.

Our courts have construed the meaning of “voucher” as used in the act concerning local improvements.

In the case of *First National Bank of Chicago v. City of Elgin, et al.*, decided by the Appellate Court for the Second District in 136 Ill. App., page 453, the court says:

“Section 23 of the Lien Law gives a sub-contractor on a public improvement ‘a lien on the money, bonds

or warrants due or to become due such contractor for such improvement: provided, such person shall, before payment, or delivery thereof is made to such contractor notify the officials of the * * * city or municipality whose duty it is to pay such contractor of his claim by a written notice.' The sub-contractors gave notices to the proper officials, but these notices were not given until after Exhibits 'A' to 'E' inclusive were received by the contractors and by them assigned to appellant. These documents, Exhibits 'A' to 'E', inclusive, were not money. Were they bonds or warrants within the meaning of the lien law, and was it necessary to entitle the sub-contractors to liens that they should serve their notices upon the officials of the city before said documents were received by the contractors?

"Section 88 of the Local Improvement Act of 1897, as amended, provides that payment for any improvement under that act, to be paid out of any special assessment levied in installments as therein provided, may be made in the bonds in said article provided for and that if the first installment is not collected when payments fall due, vouchers therefor may be issued payable out of the first installment when collected, and that said vouchers shall bear no interest and shall be paid from the first installment when collected. Section 86 provides for the issue of bonds by such city payable out of the second and succeeding installments, bearing interest at the rate of 5 per cent per annum, payable annually, and signed by such officers as may be prescribed by ordinance; which bonds shall be issued in sums of \$100 or some multiple thereof. It requires that each bond shall state on its face out of which installment it is payable, and that the bonds shall be divided into as many series as there are deferred installments. A form for the bond is given. That form plainly indicates that each bond is to be drawn against a single installment to be specified in the bond. Said Section 86 also permits payment of a voucher or bond out of any installment having a surplus to its credit, other than the installment against which it is drawn. Section 91 provides for payments from time to time as the work progresses, upon certificates by the Board of Local Improvements or by some officer designated by said board, which payments 'may be made either in money, vouchers or bonds, as herein provided.'

“The ordinary meaning of ‘voucher’ is a document which shows that services have been performed or expenses incurred. It covers any acquittance or receipt discharging the person of evidencing payment by him. When used in connection with the disbursement of moneys it implies some instrument that shows on what account or by what authority a particular payment has been made, or that services have been performed which entitle the party to whom it is issued to payment. It vouches for the truth of accounts or estimates. After a note or a bond has been paid or cancelled or taken up, it becomes a voucher in the hands of the party paying it. In no proper sense can an instrument for the payment of money be called a voucher while it is outstanding and unpaid. It is doubtful whether the distinction has been fully observed in the use of the word ‘voucher’ in this statute. It seems to be intended by the sections above referred to that vouchers shall be issued only against the first installment provided for in the Local Improvements Act, and then only when the payments on the contract fall due and the first installment has not been collected. These vouchers were intended by the statute to be informal papers, bearing no interest, and having no special form prescribed. Exhibits ‘A’ and ‘B’ are obviously vouchers within the meaning of the statute. They are certificates that the contractor is entitled to a certain sum out of the first installment of the special assessment when collected and without interest. They do not contain any promise to pay any money. They are not accompanied by any estimates or certificates of the Board of Local Improvements, as the statute seems to contemplate. Exhibits ‘C,’ ‘D’ and ‘E’ do not conform to the definitions we have given of a voucher, nor do they comply with the requirements of Section 86 as to the contents of the bonds which the city is authorized to issue.”

In the case of *Terre Haute Vitrified Brick Company, et al. v. The Montgomery County Loan & Trust Company, et al.*, 163 Ill. App., page 441, the court says:

“It is apparent from Sections 42, 87, 88, 90 and 91, that vouchers shall be issued only against the first installment provided for in the Local Improvements Act, and then only when payments on the contract fall due and the first installment has not been collected. *National*

Bank v. City of Elgin, 136 Ill. App. 453. The so-called voucher of December 9, 1907, is not drawn against any installment of the special assessment, and by its terms is to be paid in bonds to be thereafter issued. This conclusively shows that it was not intended that it should be paid from the first installment, because the bonds can only be issued against the second and succeeding installments, the first installment being payable in cash. While bonds when issued and delivered to the contractor, or his order, constitute a payment on the contract by the express provisions of the act, it is manifest the voucher in question, being neither a bond nor a voucher drawn against and payable out of the first installment of the assessment, cannot be treated as a payment. It follows that such voucher constituted no claim or lien upon any part of the second or succeeding installments of the assessment, and that in order to become so it was essential that it be exchanged for bonds as provided by its terms."

From a consideration of the foregoing authorities, together with Section 55 of the City Code of 1911, we are of the opinion that notice of lien is valid and served upon the city treasurer in proper time notwithstanding a voucher has already been issued by the city comptroller, when such voucher has not been paid at the time of the service of the notice and is drawn against money to be collected by special assessment for the payment of any installment provided for in the Local Improvement Act other than the first installment.

When payments on the contract fall due and the first installment has not been collected, a voucher issued by the city comptroller and payable out of the first installment when collected would constitute a payment and delivery on the part of the city, and notice of lien would be of no legal value when served upon the city treasurer after the delivery of such voucher to the contractor by the city comptroller.

It was evidently intended by the Legislature that a voucher drawn against the first installment and issued when payment was due under the contract, but the first installment had not been collected, should have the same force

and effect as the delivery of a bond payable out of money to be collected for the payment of the second or succeeding installments.

Respectfully submitted,

EDWARD H. WRIGHT,
Assistant Corporation Counsel.

Approved:

CHARLES M. HAFT,
Acting Corporation Counsel.

Appointment of Business Director of Municipal Tuberculosis Sanitarium.

October 12, 1915.

CIVIL SERVICE COMMISSION, City of Chicago.

Gentlemen:

We are in receipt of your letter of September 17, with the enclosures therein mentioned, requesting an opinion as to whether Frank E. Wing has been legally appointed to the position of business director of the Municipal Tuberculosis Sanitarium of Chicago.

We understand from your letter and the enclosed communication that the following are the material facts:

On February 8, 1911, the Board of Directors of the Tuberculosis Sanitarium passed an order that all vacancies in places of employment under the board should be filled by requisition upon the Civil Service Commission, and since that time the practice of making appointments from civil service lists in accordance with this order has been continually maintained by this board.

Mr. Frank E. Wing, at the time the above mentioned order went into effect, was general superintendent of the Tuberculosis Sanitarium, and continued in that position until October 3, 1914, when the name of the position was changed to administrative secretary. Mr. Wing continued in the position under the new name until August 12, 1915, when he was appointed business director by the board. This

position was created August 12, 1915, by the board, and the duties and salary thereof are practically the same as those of administrative secretary, except for some additional duties which had formerly been performed by the business agent of the sanitarium and which were added to the duties of the business director.

Mr. A. A. Bachler took a civil service examination for business agent of the sanitarium and was certified by the Civil Service Commission and appointed by the Board of Directors to that position. On August 12, 1915, a portion of the duties of business agent were given to the business director and the balance of them to other employes, resulting in the position of business agent being discontinued and an order that the services of Mr. Bachler be dispensed with after September 15, 1915, was passed by the directors. Mr. Bachler claims that he should have been appointed to the position of business director by virtue of his civil service standing.

The Tuberculosis Sanitarium Act was passed subsequent to the adoption of the Civil Service Act by the City of Chicago, and all offices and places of employment created by virtue of the Sanitarium Act were therefore created subsequent to the adoption of the Civil Service Act. This fact does not necessarily exclude such offices and places of employment from being under civil service, as our Supreme Court has held that the Civil Service Act operates prospectively. (*People v. Lower*, 236 Ill. 608.) Under the authority of this case the Civil Service Act controls all appointments and removals to and from offices and places of employment created by ordinance subsequent to the adoption of the act and also all offices and places of employment created by statute subsequent to the adoption of the act, except when the statute by express provision or necessary implication provides otherwise. (*McGann et al. v. The People*, 227 Ill. 567; *McGann et al. v. The People*, 208 Ill. 203.)

In *McGann et al. v. The People*, 227 Ill. 567, the court, in holding that the clerks of the Municipal Court are not subject to civil service because the Municipal Court Act expressly provided otherwise, at page 569, said:

“Section 14 of the Municipal Court Act provides that there shall be elected a clerk of said Municipal Court, whose term of office shall be six years; and Section 15 thereof provides ‘that said clerk shall appoint such number of deputies as may be determined, from time to time, by a majority of the judges of the Municipal Court by orders signed by them and spread upon the records of said court,’ and that ‘any deputy clerk shall be subject to removal at any time by an order signed by a majority of the judges of the Municipal Court and spread upon the records of said court.’ This language indicates so clearly that the deputy clerks of the Municipal Court of Chicago are to be appointed by the clerk of said court, and said deputy clerks, when appointed, are to be under the control of the judges of said court, that the statute is not open to construction. The courts cannot disregard the plain language of a statute, and it is their duty to accept it as they find it and enforce it as it is plainly written. (*Ottawa Gas Light and Coke Co. v. Downey*, 127 Ill. 201; *City of Chicago v. McCoy*, 136 *id.* 344.) And if there were a conflict between the provisions of the Civil Service Act and the Municipal Court Act, the provisions of the latter law having been enacted into law subsequent to those of the Civil Service Act, the Municipal Court Act would necessarily control. It is also a rule of construction that a special act will control although there may be provisions found in a general act which, but for the provisions of the special act, would include the subject matter covered by the provisions of the special act. Here the Municipal Court Act provides that the clerk of the Municipal Court shall appoint such number of deputies as may be determined, from time to time, by a majority of the judges of the Municipal Court, and that such deputy clerks shall be subject to removal at any time by a majority of the judges of said court. To undertake to read into said statute the provision that the clerk of said court should appoint said deputies in accordance with the provisions of ‘An Act to regulate the civil service of cities,’ would be for this court to legislate upon the subject of the appointment of deputy clerks of the Municipal Court, which this court is powerless to do.” A portion of Section 6 of the Tuberculosis Sanitarium

Act is as follows:

“* * * Said board shall have the power to purchase or lease ground, and to occupy, lease or erect an appropriate building or buildings for the use of said sanitarium by and with the approval of the City Council or Board of Trustees, as the case may be; shall have the power to appoint a suitable superintendent or matron or both and all necessary assistants and fix their compensation and shall also have power to remove such appointees. * * *”

There are three things which will be immediately noted in considering the authority of the Board of Directors of the Tuberculosis Sanitarium concerning appointment and removal of employes as expressed in the above quotation from the statute:

First: While the board is given authority to purchase or lease ground, etc., only with the approval of the City Council, yet no such restriction as approval of the City Council is provided for in making appointments and removals of employes under the board.

Second: The power of removal of employes is given to the board, which power is inconsistent with the provisions concerning the removal of civil service employes in the Civil Service Act. This shows an intent on the part of the Legislature that appointments and removals shall not be subject to the Civil Service Act.

Third: The board is given the power to fix the compensation of its employes, which is still further evidence of the intention of the Legislature that the board shall have unrestricted power and authority over the employes of the sanitarium.

A careful consideration of this portion of Section 6 of the Sanitarium Act and Section 15 of the Municipal Court Act as set forth in the above opinion of the Supreme Court, discloses that the wording of the authority for the appointment and removal of the employes of the sanitarium under the one section and deputy clerks of the Municipal Court under the other section are very similar. The reasons which caused the Supreme Court to decide that deputy clerks of the Municipal Court are not under civil service apply

with equal force to those holding positions under the Board of Directors of the Tuberculosis Sanitarium.

We are, therefore, of the opinion that the Board of Directors of the Tuberculosis Sanitarium has power and authority to appoint and discharge employes under it at its pleasure. While the board may appoint the employes after certifications from a civil service list, such appointments are legal by virtue of the unrestricted power of appointment vested in the board by the statute and not by virtue of any civil service rights which the appointees may have had to such appointments. The appointees, therefore, are subject to removal by the board at its pleasure.

For the reasons above mentioned, we are of the opinion that the appointment of Mr. Frank E. Wing as business director of the Municipal Tuberculosis Sanitarium of Chicago by the board was a legal appointment.

We are herewith returning the enclosures in your letter.

Very respectfully,

JOHN E. FOSTER,

Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,

Corporation Counsel.

Money Seized in Gambling Raids.

October 15, 1915.

HON. CHARLES C. HEALEY, General Superintendent of Police.

Dear Sir:

We are in receipt of your communication of July 2nd, to which is attached a letter addressed to you by H. F. Schuettler, First Deputy Superintendent of Police, and a letter written by Sergeant John W. Gillard, of the Gambling Squad, to H. F. Schuettler, and also your communication of August 30th, all of which relate to the same general matter.

You state that in several instances arrests for gambling

have been made by your officers, who have confiscated various amounts of currency, which were presented as evidence in court, and that in nearly every instance in which a conviction was had the court confiscated the money held as evidence and ordered it turned over to a poor fund.

You further state that heretofore such moneys have been turned over to the custodian of police so that he might turn this money into the Police Pension Fund.

You request an opinion as to whether the court has a legal right to turn this money over to any so-called poor fund.

The consideration of this matter naturally resolves itself into two questions:

First: The authority or right of the judges to confiscate and place in a special fund, initiated and maintained under their orders, money which has been seized in gambling raids.

Second: What disposition should be made of this money according to law:

Section 137 G., of the Criminal Code, Chapter 38, Hurd's Revised Statutes of 1913, provides as follows:

“DECLARED A GAMBLING DEVICE—CONFISCATION.) Every clock, tape machine, slot machine or other machine or device for the reception of money on chance or upon the action of which money is staked, hazarded, bet, won or lost is hereby declared a gambling device and shall be subject to seizure, confiscation and destruction by any municipal or other local authority within whose jurisdiction the same may be found.”

Section 983 of The Chicago Code of 1911, entitled “Seizure of gambling implements,” provides in part as follows:

“It is hereby made the duty of every member of the department of police to seize any table, wheel, instrument, device or thing used for the purpose of gaming or gambling for money or other valuable thing; and all such tables, instruments, devices or things when seized shall be destroyed. * * *”

The above sections enumerate in considerable detail the various gambling implements, devices, instruments and par-

aphernalia that shall be subject to seizure, confiscation and destruction by the proper authorities. No reference whatever, either expressed or implied, is made in said sections to the matter of money, which may be involved in gambling. There cannot, under any reasonable interpretation, be grounds for assuming that there was any intention to render money associated with gambling amenable to confiscation and destruction. Furthermore, it is manifestly inconceivable that there was any intendment to compel the destruction of money, which in itself is not of a gambling nature *per se*, but may be used for lawful purposes.

Section 132, of the Criminal Code, Chapter 38, Hurd's Revised Statutes of 1913, provides in part as follows:

"LOSSES BY GAMBLING.) Any person who shall, at any time or sitting by playing at cards, dice or any other game or games, or by betting on the side or hands of such as do game, or by any wager or bet upon any race, fight, pastime, sport, lot, chance, casualty, election or unknown or contingent event whatever, lose to any person, so playing or betting, any sum of money, or other valuable thing, amounting in the whole to the sum of \$10, and shall pay or deliver the same or any part thereof, the person so losing and paying or delivering the same, shall be at liberty to sue for and recover the money, goods or other valuable thing, so lost and paid or delivered, or any part thereof, or the full value of the same, by action of debt, replevin, assumpsit, or trover, or proceeding in chancery, from the winner thereof, with costs, in any court of competent jurisdiction. * * *"

This indicates clearly the intention of the law is that money lost in gambling shall be recoverable by a proper action at law, and further supports the contention that under the law there shall be no confiscation of gambling money.

Referring to question number 2 with reference to what disposition should be made of money seized in gambling raids, Section 1916-a of the ordinance effecting the reorganization of the police department, pp. 3023 and 3024 of the Council Journal of December 30, 1912, provides in part as follows:

“The custodian of lost and stolen property, under the direction of the second deputy superintendent of police, shall act as custodian to all property seized or taken by the police. * * *

“It shall be the duty of said custodian to keep a record of all property which may be seized or otherwise taken possession of by the Department of Police of the city; and if such property so seized or taken possession of shall not be claimed by the rightful owner thereof, and possession surrendered to such owner within sixty days from the date of the final disposition of the court proceedings in connection with which said property was seized or otherwise taken possession of, or in case there are no such court proceedings, then if such property so seized or taken possession of shall not be claimed by the rightful owner thereof and possession surrendered to such owner within sixty days from the date of such seizure or taking possession of by the Department of Police, said custodian shall publish, or cause to be published in the official newspaper of the city, a description of such property together with the date of seizure or the taking possession thereof, and shall give notice that if such property be not claimed by the rightful owner or owners thereof within ten days from the date of such publication, such property will be sold at public auction, at such place as the second deputy superintendent of police may direct, and in such manner as to expose to the inspection of bidders all property offered for sale.

“In addition to the publication of notice herein provided for, said custodian shall post or cause to be posted in at least three public places in the city where public notices are commonly or usually posted, a copy of the notice published in the said official newspaper, and shall make a record of the date when such publication and the posting of notices are made, and if within ten days from the date of such publication and posting, no claim for such property described in such notices shall have been made by the rightful owner thereof, the custodian shall proceed to sell such property at public auction.

“The proceeds of any sale or sales so made, after deducting the cost of storage, advertising, selling and other expenses incident to the handling or selling of such property, shall be paid by such custodian to the police pension board, to be credited to the police pension fund of the city; * * *

"It is hereby made the duty of all officers and members of the department into whose possession any property seized or taken shall come, to deliver the same at once to the said custodian unless it is wanted for immediate use as evidence in any case, and in that event a report and inventory of the same shall be forwarded at once to the said custodian."

As has been noted above, the custodian of lost and stolen property shall act as custodian of *all property* seized or taken by the police and shall make disposition of same in the manner prescribed.

A question arises as to what the term "property," as used in said Section 1916-a of the council ordinance, referred to above, includes in contemplation of law.

"Property" means everything of exchangeable value and includes money, chattels, things in action and evidence of debt.

Fishburn v. Londershausen, 92 Pac., 1060, 1062, 50 Or. 363, 14 L. R. A. (N. S.) 1234, 15 Ann. Cas. 975 (citing 6 words and Phrases, p. 5694).

The term "property" includes everything of value tangible or intangible capable of being the subject of individual right or ownership.

First National Bank of Estherville v. City Council of Estherville, 112 N. W. 829, 832, 136 Iowa, p. 203.

We are of the opinion that that part of Section 1916-a of the police department re-organization ordinance which provides that the custodian shall act as custodian of *all property* seized or taken by the police, confers and imposes upon the custodian the right and duty to demand and retain custody of money which is seized by duly authorized officers of the police department in making gambling raids. The ordinance above mentioned provides, of course, that property, which is seized or otherwise taken under authority of this section, shall be advertised for sale in the event that the owner thereof shall not have claimed this property within sixty days from the date of court proceedings relating to the gambling cases in connection with which same was seized.

It is our belief, however, that in the particular instance of money the council did not intend to subject this money to the sale thereof, as money has a certain fixed standard of value which does not fluctuate. We are of the opinion that the intent and purposes of the ordinance would be substantially complied with if the custodian, in case gambling money is not claimed within the allotted time, advertises the same in conformity with the provisions of said ordinance so as to afford the true owner an opportunity to claim the money. If no person proves his title to such money, the custodian should turn it over to the police pension fund after deducting therefrom the cost of advertising and incidental expenses incurred in making disposition of this money.

Section 391 of Chapter 24, of Hurd's Revised Statutes of 1913, provides in part as follows:

“POLICE PENSION FUND—HOW FUND CREATED.) * * *

Fifth: the proceeds of all sales of unclaimed, lost or stolen property.”

This, in our opinion, has particular application to the disposition of money seized in gambling raids under reasoning akin to that given in our interpretation of Section 1916a of the police department reorganization ordinance as hereinbefore noted.

We are, therefore, of the opinion that the judges in ordering turned over to the so-called poor funds, initiated and maintained under their orders, money which is presented in court merely for the purpose of evidence in gambling cases, are guilty of a usurpation of authority with regard to the disposition of such money which by law is vested in the city custodian. The custodian should be permitted to make disposition of money seized in gambling raids in the manner prescribed by ordinance without any interference, judicial or otherwise.

We herewith return Mr. Schuettler's and Mr. Gillard's communication.

Yours very truly,

JOHN A. COOKE,

Approved: *Assistant Corporation Counsel.*

RICHARD S. FOLSOM,
Corporation Counsel.

Reconstruction of Existing Flat Building.

October 16, 1915.

HON. CHARLES BOSTROM, Commissioner of Buildings.

Dear Sir :

We are in receipt of your letter of the 11th inst., wherein you ask for an interpretation of Sections 432 (a), 512 and 514 (c) of The Chicago Code of 1911, and their relation to an application for a permit to reconstruct an existing flat building.

I have taken this matter up with Mr. Knight of your office and he has informed me as to the details in the proposed reconstruction.

Section 432 provides :

“ ‘New tenement house’ shall include every tenement, flat and apartment house hereafter erected and every tenement house which shall be increased or diminished in size or otherwise altered after its erection, and every building now or hereafter in existence not now used as a tenement house but hereafter converted or altered to such use.”

This section to be properly construed must be read in connection with Sections 512, 513, 514 (a) and 514 (c).

Section 512 of the city code provides as follows :

“CONSTRUCTION OR ALTERATION OF BUILDING—REQUIREMENTS.) Every building or structure or part thereof, hereafter constructed, erected, altered, enlarged, repaired or changed within the city shall be so constructed, erected, altered, enlarged, repaired or changed in accordance with the provisions of this chapter.”

The two sections above quoted must be read together and in connection with Section 513, which modifies the force of Section 512.

The construction of the several sections heretofore quoted and of all other sections quoted in this chapter are governed by Section 514(a), which provides :

“ALTERATIONS OF EXISTING BUILDINGS.) (a) In construing the several sections of this chapter, said sec-

tions shall not be construed as requiring alterations in the construction or equipment of buildings or structures in existence at the time of the passage of this chapter, except where specifically provided, unless such buildings shall not have sufficient or adequate means of egress therefrom or ingress thereto, by reason of insufficient or inadequate stairways or stairways improperly located or insufficient or inadequate elevators or elevator equipment, doors, fire escapes, windows or other means of egress or ingress, and except also in sections which are herein made retroactive.”

Paragraph “c” of Section 514 was interpreted by this department in an opinion rendered July 17, 1914. At that time, it was held that Section 514 (c), if literally construed, would in many instances endanger the validity of this whole ordinance. The building ordinances were passed under the police powers of the municipality, and, as such, were made rules for the safety in construction and maintenance of buildings.

In construing the several sections of the Building Code, it is necessary to so interpret the same as to make them consistent with each other and to avoid the question of validity, and to carry out the intention of the City Council when they enacted this ordinance.

In view of the foregoing sections heretofore quoted, I do not think it was the intention of the City Council when it enacted Section 514(c) to compel the reduction of an entire structure when only a portion of the same was about to be altered, that the true intent manifested by the several other sections of the Building Code was to only require such alterations to be made in accordance with the existing provisions.

Consequently, we are of the opinion that the permit applied for should be granted.

Yours very truly,

GEORGE A. CURRAN,

Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,

Corporation Counsel.

Dedication of Plaisance Court.

October 18, 1915.

HON. WILLIAM G. KEITH,

Commissioner of Gas and Electricity.

Dear Sir:

We are in receipt of your communication of October 6, 1915, asking us to advise you as to whether or not Plaisance court at Blackstone avenue between 60th and 61st streets has been dedicated to the public; also if your department is required to light this street.

From an examination of the records in the county recorder's office, we find that on December 13, 1894 (Book 63, page 46), a plat was recorded showing a subdivision by Frank I. Bennett of Lots 36, 37, 38 and 39 in Keith's South Park Addition (in the S. E. $\frac{1}{4}$ of Sec. 14, T. 38 N., R. 14 East of the Third Principal Meridian), into a street and sixteen lots, said street being labeled "Plaisance court."

We made a personal inspection of Plaisance court on October 14, 1915, finding conditions existing as follows:

The dimensions of Plaisance court are approximately 40 feet by 125 feet. It is surrounded on three sides by buildings used for residential purposes; the side which has no buildings thereon abuts Blackstone avenue. Said court is covered with grass over its entire area, the level of this ground being about 12 inches higher than the level of the sidewalk on Blackstone avenue. There are six trees in the court in various locations. This grass plot is protected by a four-inch by four-inch wooden fence on three sides and by a combination iron and stone picket fence on the side which abuts Blackstone avenue, with a gate on the north end and on the south end outside of the north and south lines of Plaisance court. A cement sidewalk was laid sometime ago, under private contract of the owner, in front of all the buildings which were erected in this subdivision.

A combination cement sidewalk and curb was laid by the city sometime ago in Blackstone avenue without leaving any street opening to afford the means of ingress and egress for street purposes in connection with Plaisance court.

A fire hydrant was installed by the city in April, 1895, in the grass plot between the building line and the private cement walk on the east end of said subdivision.

It is very doubtful that Plaisance court can be regarded as a public street, inasmuch as there does not seem to have been any positive act upon the part of the city which might be construed as an acceptance of the offer of dedication of the same as a public street that was made by the owner at the time he subdivided this land. Furthermore, the city has apparently made no effort to prevent its being improved and maintained in a manner partaking of a private nature, thus precluding public use thereof as a street, as hereinbefore indicated.

If the city is desirous of accepting the offer to dedicate Plaisance court as a public street, an ordinance, providing for the formal acceptance of same, should be passed by the City Council, and the fences, trees and grass plot should be removed therefrom, and the sidewalk and curb removed from that portion of Blackstone avenue upon which Plaisance court abuts, so as to permit public use of such street.

With regard to the question of lighting, will say that in view of the above circumstances, we are of the opinion that the city is not required to furnish lighting facilities for Plaisance court as it now exists.

Yours very truly,

JOHN A. COOKE,

Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,

Corporation Counsel.

NOTE—See also *Wise v. City*, 187 Ill. App. (?)

Tax for Firemen's Pension Fund.

October 22, 1915.

HON. CHARLES E. MERRIAM,

Chairman Sub-Committee of Committee on Finance.

Dear Sir:

You expressed a desire for an opinion as to whether it is legal for the City Council to levy a tax under the new

Firemen's Pension Fund Act for that part of the year 1915 prior to July 1st, at which date the law went into effect.

In our opinion, the City Council may levy the tax for the entire fiscal year even though half of it had expired before the act became operative.

It will be noted that the title of the act shows that the act is intended to revise the law creating a firemen's pension fund, and both the title and the body of the act take into consideration the fact that the fund was in existence before the act was passed. The legislation does not relate to something which is created at this time, but is in furtherance and in support of a system and funds heretofore collected for the purpose of pensioning firemen. The title of the act reads as follows:

“An Act to revise the law creating a firemen's pension fund in cities, villages and incorporated towns, whose population exceeds five thousand (5,000) inhabitants.”

It will thus be seen that the act does not establish a new thing of which the City Council takes jurisdiction for the first time. This is important when taken in connection with the power to tax for the year 1915 that is conferred on the City Council by the act.

It is provided by Section 1 of this statute that, in all cities, villages or incorporated towns where the population exceeds five thousand (5,000) and where a paid fire department is maintained, the City Council or the Board of Trustees, as the case may be, “shall have the power to levy a tax for a period of three years, beginning with the year 1915 not to exceed three-tenths of a mill on the dollar on all taxable property of such city, village or incorporated town.” It is further provided that such tax is to be levied and collected in like manner as the general taxes of the municipality, and that, when collected, the moneys derived therefrom, together with certain other sums, are to be set apart by the treasurer of the municipality “as a fund for the pensioning of disabled and superannuated firemen and of the widows and orphans and dependent parents of deceased firemen in such cities, villages or incorporated towns.”

There is nothing in the act limiting the application of the funds collected each year to the expenses for that year but they are simply to be placed into the fund to be used as occasion may require. It is true that Section 12 of this act requires the Board of Trustees of the Pension Fund on the first Monday of November of each year to make a report to the City Council showing the condition of same and containing an estimate of the amount of taxes necessary to be levied to carry out the provisions of the act for the following fiscal year. It may be said, therefore, that in subsequent years the tax levied will have to bear some relation to the estimates thus made, even though the use of the moneys collected will not be confined to the expenses for that fiscal year. But, it is plain that the Legislature intended that the tax should be levied for the year 1915 for this purpose without such preliminary estimate having been made. Consequently, in the absence of a report such as is provided for in Section 12, the determination of the amount to be levied rests with the City Council, and its discretion in the matter cannot be successfully assailed. Nothing in the act indicates that the levy in 1915 should be reduced below the three mill limitation by reason of a portion of the year having elapsed before the act went into effect. We, therefore, conclude, from the wording of the act itself, that the full amount of the tax may be levied if the City Council deems it proper to do so.

We have made a search for authorities in support of the above opinion. We are unable to find a case which decides the precise question, although we find many instances of taxes being levied the same year that the statute authorizing the levy went into effect. In such cases, the levy is always for the full year and no account is taken of the time that has elapsed before the act went into effect.

We also find cases which decide questions along the same lines, and the opinions rendered in those cases support our view.

In the case of *Wagoner v. Evans*, 170 U. S., 588, the Supreme Court of the United States passed on the right of the territorial legislature of Oklahoma to levy a tax on cattle

and personal property in reservations which had been attached to counties for judicial purposes. The legislature had passed the act in question on March 5, 1895. It granted the local authorities the right to levy a tax without specifying when it should be levied. These local authorities, for certain reasons which do not concern us in the present inquiry, undertook to levy the tax for the years 1892, 1893, 1894 and 1895. It was decided in this case that the levy for the first three years was invalid, but the court sanctioned the tax for the year 1895, although part of the year had elapsed before the act authorizing the levy was passed.

In other cases, the question has been raised whether the owners of property in new territory that has been added to a taxing district after a tax has been voted should be required to pay such tax. In the cases cited below, school districts were extended after the tax had been voted, and it was held that such tax voted before the extension can be collected from the owners of the property in the new territory.

Seattle School Dist. v. King County, 3 Wash. 154; *Fifield v. Swett*, 56 N. H., 432.

The question decided in the above cases is practically the same as the one propounded by you, the only difference being that in those cases the territory is enlarged, thus bringing new persons who are property owners within the jurisdiction, while in the present instance the passage of the act instead of the enlargement of the district brings the owners of property within the provisions of same.

In view of the above authorities and what appears to us the plain meaning of the statute and the intent of the Legislature in the premises, we are convinced that the City Council has complete authority to levy a tax in any amount up to three mills on the dollar for the purpose of providing money for the pension fund which is now in existence.

Yours respectfully,

RICHARD S. FOLSOM,

Corporation Counsel.

October 25, 1915.

**Status of Railroad Company in Wallace Street between 80th
and 81st Streets.**

HON. WILLIAM R. MOORHOUSE, Commissioner of Public Works.

Dear Sir:

On the 21st inst., His Honor, The Mayor, received a communication from the firm of Tinsman & Blocki, lawyers, which was referred to this department for investigation and report, which communication questioned the right of the Chicago & Western Indiana R. R. Co., now elevating its tracks, to occupy any part of Wallace street, between 80th place and 81st street, excepting such part as comes within its right of way.

The subject of Wallace street, at this point, is a matter in which a plan was approved as submitted by said railroad company about June 5, 1915, which plan provides for the occupation by said railroad company of all of Wallace street, excepting the west 22.5 feet thereof, between 80th and 81st streets. This plan was approved by the following city officials:

Engineer of Street Department, S. Gold.

Superintendent of Streets, Walter G. Leininger.

Engineer of Sewers, W. R. Matthews.

Superintendent of Water Pipe Extension, H. L. Lucas.

Superintendent of Sewers, Geo. E. McGrath.

Engineer of Water Pipe Extension, R. S. Spalding.

City Engineer, John Ericson.

Commissioner of Public Works, W. R. Moorhouse.

There is nothing to warrant or justify giving the railroad company the land on Wallace street, between 80th and 81st streets, as set out in said plan, under the terms of any of the ordinances, by virtue of which they are operating in Chicago, as follows:

Ordinance passed by the Trustees of Town of Lake
on September 5, 1879. (Special Ordinances of
Chicago, 1898, Vol. 1, p. 585.)

Ordinance passed by the City Council of Chicago,
July 13, 1908. (C. P. p. 1187.)

Amended October 5, 1908. (C. P. p. 1369.)

Amended November 9, 1908. (C. P. p. 1710.)

Amended December 14, 1908. (C. P. p. 2039.)

Amended November 1, 1910. (C. P. p. 1601.)

Amended July 28, 1913. (C. P. p. 1825.)

I am mindful of the fact that an opinion was rendered by this department under which you and the other department heads acted in approving this "General Plan of Subway, West 81st St.," but neither your act nor that of the others, acting upon the opinion rendered by Mr. Michaels, in any way impairs the rights of the City of Chicago.

It is a well settled rule of law that acts of an officer unauthorized by ordinance do not bind the city.

American and English Encyclopedia Law, 2d Ed., Vol. 20, p. 1217.

Hibbard, Spencer, Bartlett & Co. v. City of Chicago, 173 Ill. 91.

Mayor and City Commissioner of Baltimore v. Eschbach, 18 Md., 276.

Hope v. City of Alton, 214 Ill., 102.

Sciery v. Springfield, 112 Mass., 512.

Burton Company v. City of Chicago, 236 Ill., 383.

Hoyt v. McLaughlin, 250 Ill., 442.

Meltzer v. City of Chicago, 152 Ill. App., 334.

The Chicago & Western Indiana Railroad Company is bound by the terms of the amended ordinance to improve Wallace street from the south line of West 80th street to the north line of West 81st street, as therein provided. (July 28, 1913, C. P. p. 1844.)

Everything that is to be done under the terms of any of the ordinances hereinbefore referred to, is always referred to as coming within the right of way of said railroad company, and the right of way is now established, since said railroad company has raised its roadbed and tracks, and to me it would seem, that it is plain as to what is the western boundary of its right of way at a point about 79th street, where the Chicago, R. I. & P. R. R. Company built

an abutment or support for its elevation over the tracks of the Chicago and Western Indiana Railroad and along the west side of the right of way of the Chicago and Western Indiana Railroad.

I have made a personal inspection of this street and find that the retaining wall commencing at 80th street runs due south as far as it is built and apparently is intended to be continued to 81st street, when as a matter of fact, the wall should be built in a southeasterly direction along its right of way, and if it were so built at 80th place, it would not take more than six or seven feet of what is now known as Wallace street.

It is plain to be seen that Wallace street is a much traveled thoroughfare and a great part of it has now been covered by sand and cinders, which go to make up the embankment of the elevation.

Since the ordinances provide that all of the work required to be done on this elevation is subject to inspection and approval by your department and must be in accordance with the provisions of this ordinance, it is my opinion that your department should notify the Chicago and Western Indiana Railroad Company, that it is not proceeding in accordance with the terms and conditions of the ordinances, and that its encroachment upon Wallace street between 80th and 81st streets is unlawful, and that it will have to present a new plan for your approval, and that such parts of retaining walls and abutments as now extend beyond their right of way upon Wallace street between the points mentioned will have to be removed. (C. P., July 13, 1908, Sec. 10, page 1229.)

Very truly yours,

ANTON T. ZEMAN,
Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,
Corporation Counsel.

**In re Applications of Arthur J. Calder & Adolph Wilke
for Pensions.**

October 25, 1915

TO THE BOARD OF TRUSTEES OF THE FIREMEN'S PENSION FUND
OF THE CITY OF CHICAGO.

Gentlemen:

We are in receipt of the petitions of the above named applicants, with a request from your honorable board that we furnish to your board an opinion as to whether or not, under the law, the said Arthur J. Calder and Adolph Wilke are entitled to pensions.

From an examination of the petition of the said Arthur J. Calder, it appears that he joined the Fire Department on May 9, 1868, and served continuously until July 5, 1884.

From an examination of the petition of the said Adolph Wilke, it appears that he joined the Volunteer Fire Department in 1852, and served as a volunteer fireman until the 2nd of January, 1859, when he entered the paid Fire Department of the City of Chicago and served continuously until 1868, when he received serious injuries and took a furlough from the Fire Department and remained out of the department about three years, then returned and remained in the department until the fall of 1881, at which time he tendered his resignation. In his petition Mr. Wilke states that his resignation was necessary on the advice of physicians who stated that on account of the condition of his lungs as the result of the injuries received by him in 1868, it was dangerous for him to continue in the occupation of a fireman, as he was likely to choke to death on account of smoke and fumes while at fires.

The General Assembly of the State of Illinois passed an act entitled, "An Act for the relief of disabled members of the Police and Fire Departments in cities and villages," approved May 24, 1877, in force July 1, 1877, amended May 10, 1879, in force July 1, 1879, which act as amended remained upon the statute books of the State of Illinois until it was

superseded by the Act of 1887, which latter act was effective July 1, 1887. Whether or not these applicants are entitled to pensions must be determined by the Act of 1877 as amended in 1879.

Sections 6 and 7 of the Act of 1877 as amended in 1879 provided as follows:

“PERMANENT DISABILITY—DEATH—ANNUITY.) §6. When, in the judgment of the board, a sufficient amount shall have accumulated in said fund to justify the application thereof to the use for which the same is hereby created, if any member of the police or fire departments, while in the actual performance of duty *or other person entitled to the benefits of this fund as hereinafter provided*, shall become permanently disabled, so as to render proper his retirement from membership, a sum not exceeding six hundred dollars (\$600) per annum, or such less sum as, in the judgment of the board, the fund will justify, shall be paid to such member out of said fund; or if any member, while in the actual discharge of duty, shall be killed, or shall die from the immediate effects of an injury received by him while in such discharge of duty, or shall die after ten years' service in the police or fire departments, and shall leave a widow, or if no widow, any child or children under the age of sixteen (16) years, a sum not exceeding six hundred dollars (\$600) per annum, or such less sum as, in the judgment of the board, the condition of the fund will justify, shall be paid to such widow so long as she shall remain unmarried, or to such child or children while under the age of sixteen years.

“WHO ENTITLED TO BENEFITS.) §7. Any person who shall have served in either the police or fire departments of said city or village for the full term of ten (10) years, and shall have paid into the fund hereby provided for all assessments regularly made upon him by the Board of Trustees as required by this act, and the regulations of the said Board of Trustees passed in pursuance of this act, and shall have complied with all the rules and regulations lawfully established by the Board of Trustees in the same manner, as if such person was an active member in said police or fire department, may continue his membership in this organization, and be entitled to the benefits of this fund after he shall have ceased to be a member in either said police or fire department, by complying with all the provisions of this

act, relative to the payment of assessments, etc., the same as prior to his ceasing to be a member of said departments, and the widow or children of such person shall be entitled to all benefits hereby secured to other members of this organization."

Section 9 of The Firemen's Pension Fund Act, approved May 13, 1887, in force July 1, 1887, provides as follows:

"BENEFICIARIES UNDER PRIOR ACT.) § 9. The widows and orphans of deceased firemen and *retired members of the fire department*, who are now entitled to pension or annuity under the provisions of an act entitled: 'An Act for the relief of disabled members of the police and fire departments in cities and villages,' approved May 24, 1877, as amended, shall be entitled to the benefits, pensions and annuities provided for by this act."

The question for us to determine is, who were entitled to pensions under the Act of 1877, as amended in 1879, as this was the act that was in force and effect when both these applicants ceased being members of the fire department. For the purpose of gathering the meaning and intent of the Legislature, it is necessary to construe Sections 6 and 7 of this act together with Section 9 of the Act of 1887.

It will be observed that Section 6 of the Act of 1877 provided that, when in the judgment of the board a sufficient amount shall have been accumulated in said fund to justify the application thereof to the use for which the same is created, if any member of the police or fire departments, while in the actual performance of duty should become permanently disabled so as to render his retirement necessary, said retired member shall be paid a sum not exceeding six hundred dollars (\$600) per annum. In addition to providing for the payment of persons so disabled, said Section 6 provided that any other person entitled to the benefits of this fund as hereinafter provided, should also be paid a sum not exceeding six hundred dollars per annum.

We are, therefore, compelled to ascertain whom the General Assembly had reference to in Section 6 when it referred to *other persons entitled to the benefits of this act*, and we

find, from an examination of Section 7 of the said act, that the other person referred to in Section 6 is, *any person who shall have served in either the police or fire department for the full term of ten years*, and it provided that such person might continue his membership in the said pension organization by complying with the provisions of this act and continuing to pay any dues or assessments that might be levied against him.

When we consider the language of Section 6, the intention of the Legislature is clearly apparent. As we have already stated, Section 6 provided that when the pension fund created by the Act of 1877 had reached a sufficient amount to justify payments therefrom, they were to begin to make payments. Section 7 clearly indicates that it was the intention of the General Assembly to pension all firemen who had served for ten years, and that if, when the period of ten years' service was reached by them and the fund was not sufficient from which to grant them pensions, their rights to a pension were preserved and as soon as the fund would be large enough, firemen who had served ten years and retired were entitled to receive a pension. No other construction of this statute is warranted from the language contained in Sections 6 and 7. Section 9 of the Act of 1887 recognized the rights of the widows and orphans of deceased firemen and also recognized the rights of retired firemen who were entitled to pensions under the provisions of the Act of 1877 as amended in 1879. The language of Section 9 of the Act of 1887 is too clear to admit of any doubt as to the correctness of this construction.

Section 8 of the Act of 1915 recognizes the rights of widows, orphans and dependent parents of deceased firemen and all retired firemen who are entitled to pensions under the provisions of the Act of 1887.

The applications of both these men have been before your honorable board on previous occasions, and we are in receipt from you of an opinion of a former assistant corporation counsel and approved by the corporation counsel, advising your board that they are *not* entitled to pensions. Much as we dislike to disagree with our predecessors, we are com-

pelled to advise you that our predecessors arrived at their conclusion from an erroneous interpretation and wrong construction of the Act of 1877, as amended in 1879.

To entitle these applicants to pensions, all that is necessary for them to do is to prove that they had ten years' service as firemen, or ten years' service in either the police or fire department prior to 1887. The applications of these two applicants and the Act of 1877 as amended in 1879, have been passed upon by the Appellate Court of the First District and all of the questions of law and fact involved were under consideration by the court, and in a full and lengthy discussion by Mr. Justice Smith, one of the ablest jurists who ever sat on the Appellate bench, he held that ten years of service was all that was required, and that no injuries resulting in permanent disability were necessary in order to entitle the applicants hereinbefore mentioned to pensions.

It appears, notwithstanding the fact that the Appellate Court in April, 1910, fully considered the matter of the eligibility for a pension of these two applicants, together with some others, and passed upon the law and facts involved favorable to them, that three years later, in 1913, we find these same cases again before the Appellate Court on a writ of error, and the court in this instance, without passing upon either the merits of the claims of the applicants or the law involved in the construction of the Act of 1877 as amended in 1879, reversed the decision of the Circuit Court of Cook County on the mere technicalities that the petitions of the applicants did not contain sufficient averments for the court to know whether or not the Board of Trustees of the Firemen's Pension Fund has exceeded its powers in denying the applicants pensions.

We beg to advise your honorable board that the filing of applications before your honorable body by applicants for pensions has always been treated as mere formalities, and no applicant has ever been compelled to comply with any technical mode of procedure in filing an application. There is nothing in the law to prohibit an applicant from amending or changing the form of his application at any time, and in presenting an application for a pension we know of no rule

of your board that compels him to limit his proof to matters stated in his petition.

The decision of Mr. Justice Barnes reported in 176 Appellate Court, reversing the judgment of the Circuit Court awarding a writ of mandamus to compel your board to award pensions to these applicants, did not pass upon the merits of their claim and in no way altered, varied or contradicted the judgment of the Appellate Court as rendered by Mr. Justice Smith in 1910.

In regard to the provision of the Act of 1877 as amended in 1879, with reference to the paying of assessments after retirement from the department, we beg to state that the Appellate Court in 155 Ill. App., at page 475, passed upon this very point and held that it had no application, in so far as the applicants there in question were involved, inasmuch as it was not alleged that any assessment was ever fixed or that notice in writing was served upon any of the parties requiring them to pay. The court held in that opinion that the fixing of an assessment is essential, inasmuch as the law specified that the amount of assessments should not be more than five dollars annually. The court further held that notice in writing was specifically required by the act before any participant in the fund could be in default.

We, therefore, beg to advise your board that the fact that these applicants may not have contributed to the pension fund after their retirement from the department cannot now be urged to defeat their claim for pensions. If any assessments were levied during the period from the time they retired from the department up to and including July 1, 1887, your board has the right to request payments of the same now and notice of the amount must be served upon the applicants, and an opportunity given them to pay, before any advantage can be taken by the board to deprive them of their rights under the Act of 1877 as amended in 1879.

We, therefore, beg to advise your board that if the said Arthur J. Calder and the said Adolph Wilke have completed the period of service in the fire department which they allege in their petitions, they are, under the law, entitled to pensions,

and it is the duty of your honorable board to so order and direct.

Respectfully submitted,

JAMES W. BREEN,
Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,
Corporation Counsel.

Liability of City in Assigning Prisoners of House of Correction to Work Outside of Walls.

October 25, 1915.

HON. JOHN L. WHITMAN, SUPERINTENDENT OF THE HOUSE OF CORRECTION.

Dear Sir:

Your communication of recent date, requesting an opinion which would indicate whether or not the management of the House of Correction, acting for the City of Chicago, assumes additional liability to the city in case of personal injury by assigning prisoners to work outside of the walls of the House of Correction under the direction of an employe of the House of Correction, received.

Section 1495 of The Chicago Code of 1911 provides as follows:

“The superintendent of the House of Correction shall have the custody, rule, charge and keeping of the House of Correction, and of all persons committed thereto, under the supervision and direction of the board of inspectors; and he shall enforce such order and discipline as shall be directed by such board.”

Section 1497 of The Chicago Code of 1911 provides as follows:

“It shall be the duty of said superintendent to receive into the said House of Correction such persons as may be committed thereto by any court or magistrate in Cook County, authorized by the laws of the state or by any ordinance of the city, or any town or village in Cook

County having a contract with the city for the care of its prisoners, and to put each of such persons so committed, as are able to labor, to the work which they are respectively best able to do, not to exceed ten hours for each working day. Every person committed to the House of Correction by a judge of the municipal court for a violation of any city ordinance, shall be allowed for each day's work exclusive of his or her board, the sum of fifty cents, which shall be applied in payment and satisfaction of the fine and costs imposed upon such person."

The prisoner, while outside of the House of Correction, is in the legal custody and under the control of the superintendent and subject at all time to be taken back within the inclosure of the House of Correction, and the same rule of law would apply to the prisoners while working outside of the prison walls as would apply while working inside of the walls of the House of Correction.

It is well settled that a city is not liable for damage caused by acts performed in its governmental capacity. Therefore, we are of the opinion, from the above statement of facts, that the city assumes no additional liability when prisoners are assigned to work outside of the walls of the House of Correction.

Yours very truly,
CHARLES E. PEACE,
Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,
Corporation Counsel.

Transfers of Appropriations.

October 27, 1915.

HON. CHARLES H. SERGEL, City Treasurer.

Dear Sir:

Your letter of recent date relating to the legality of transfers of appropriations was referred to the undersigned for consideration and reply.

It appears that on October 4, 1915 (Printed Council

Journal, p. 1515), an order was passed by the City Council directing the transfer of \$30,000 from Account 30 A-3, Salaries and Wages, to Account 30 F, Apparatus, etc., for the purpose of purchasing motorcycles for the police department.

You first ask whether the treasurer is prohibited from complying with this order by the provisions of Section 3 of the Annual Appropriation Ordinance for the year 1915.

The portions of said section which you question read as follows:

“Section 3. That the comptroller and the heads of the other departments, bureaus and offices of the city government * * * are hereby prohibited from incurring any liability against any account in excess of the amount herein authorized for such account and from changing any salary or wages item herein, and from incurring any liability which will necessitate a transfer from the appropriations for salaries and wages in their respective departments.”

The words employed do not warrant the assumption that the City Council intended to cut itself off from making such a transfer as the heads of the departments are prohibited from making. It seems quite clear that the purpose of the prohibition is to prevent any such liability from being incurred before the council has authorized a transfer to be made. No other theory is tenable in view of the fact that this provision appears in the identical language in the Appropriation Ordinance for 1914, yet the City Council made many transfers of this kind during that year. The prohibition is directed against the officers designated, and it would be extending the same by implication to construe it as depriving the City Council of such power.

You next ask whether transfers of the kind mentioned, of which many are ordered by the City Council, are legal.

In our opinion transfers of this kind, when limited to the general uses for which appropriations are made, are entirely lawful. It would not be proper to devote moneys appropriated for the use of one department or for a special purpose to another department or to an entirely different

purpose. But a transfer even to a different department, when it is to be used for the same purpose as originally intended, must be regarded as lawful.

The statute (Art. VII, Sec. 2 of C. & V. Act) requires that the objects and purposes for which appropriations are made shall be specified. The question as to the extent of the details which must be given has never been passed on directly by the courts, although their attitude has been indicated by numerous decisions. It may be regarded as certain that no court will require such an elaboration as to hamper the business of a municipality.

Many of the subdivisions of the appropriations made annually are intended more to induce the departments to systematize their work and to enable the accounting force to exercise a closer surveillance over expenditures than to bring the same within the strict requirements of the statute. To illustrate: There is no reason why impersonal services should be distinguished from personal services other than salaries and wages except for the purpose of keeping a better check on the sums paid out for each of these purposes; in fact, they were formerly included in one appropriation. Again, the appropriations for printing and stationery are separated from those for library, furniture and fittings, whereas an appropriation so worded as to include the general office requirements of a bureau would undoubtedly be within the strict letter of the statute.

To further illustrate the point we make we call attention to the opinion of the court in the case of *People ex rel. Fuller v. Peoria, D. & E. R. R. Co.*, 116 Ill. 410. The entire appropriation ordinance of the City of Mattoon is set forth in this opinion. It contains only seven items, which really amount to appropriations in bulk. Yet the court, while not directly passing on the question, in several places in that opinion, seems to sanction same as a proper appropriation ordinance, and it decided the question of the validity of the tax levy on the failure to publish this ordinance. The court first speaks of the item for interest on bonds and then says: "After deducting \$4,300 from \$26,300, it will be seen

that Section 1 appropriates \$22,000 in certain specified amounts for six specified objects." (P. 417.)

In the case of *City of East St. Louis v. Flannigan*, 34 Ill. App. 596, a similar ordinance appropriating in bulk, was approved by the court.

Consequently, while the City Council has minutely subdivided the appropriations, it should not be assumed that such separation of items operates to deprive the City Council of the power to transfer the money so appropriated to an extent which would not, if appropriated in bulk, be unlawful.

In the case of *City of Chicago v. Berger*, 100 Ill. App. 158, it was held that an appropriation made for purposes of track elevation could properly be transferred from the department for which it was appropriated to the law department, to be used for legal expenses in connection with track elevation.

There are other decisions in which it was held that, while payments must be confined to the purpose mentioned in the appropriation until its requirements are met, a surplus may be applied by the City Council to any other lawful debt contracted by the city.

City of East St. Louis v. Flannigan, 34 Ill. App. 596.

People v. City of Cairo, 50 Ill. 154.

Our conclusion, however, is based not so much on the cases where it was actually adjudicated that a transfer of funds was legal, as on the fact that the City Council, in making such transfers as proposed in this case and in the many others where the general purpose of the appropriation remains the same, is only exercising a legal right which it could have exercised originally by combining the items. Such transfers cannot be carried on to an unreasonable extent, but to the extent indicated above they are proper. In other words, where the appropriation made for a bureau or department is merely shifted in such a way as to take care of unforeseen exigencies, it cannot be said that the

appropriation for such bureau or department has been misapplied.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,
Corporation Counsel.

Revocation of Certificates of Appointment of special Patrolmen.

October 27, 1915.

HON. HERMAN F. SCHUETTLER, Acting General Superintendent of Police, City of Chicago.

Dear Sir:

In response to your request for advice as to the validity of an order passed by the City Council on October 19, 1915 (Printed Journal, page 1758), directing the general superintendent of police to revoke the certificates of appointment of special patrolmen appointed to do strike duty at any of the garment manufacturers' shops during the present garment workers' strike, we beg leave to submit the following:

The said order can not be regarded as a valid enactment or as having any force or effect whatever, owing to the fact that it was passed contrary to the charter provisions governing the procedure in the City Council.

The statute which controls the matter in question appears in the Cities & Villages Act as Section 15 of Article III. This section reads as follows:

“Any report of a committee of the council shall be deferred, for final action thereon, to the next regular meeting of the same after the report is made, upon the request of any two aldermen present.”

At the meeting in question the Committee on Schools, Fire, Police and Civil Service submitted a report recommending the passage of the said order. (See Printed Jour-

nal, page 1672.) After the report was submitted, an alderman moved that the consideration of same be deferred and that the corporation counsel be directed to render an opinion in reference to same. The chairman of the committee moved to lay the motion on the table. That motion prevailed by a vote of 57 yeas to 6 nays. Then appears the following paragraph in the Journal:

“Two aldermen having requested that final action on said report be deferred until the next succeeding regular meeting of the council, consideration thereof was deferred and said report was ordered published.”

After this action was taken by the City Council and the matter was deferred to the following meeting, the chairman of the said committee brought up the same proposed order as new matter and moved its passage. The only difference between the order presented as new matter and the order reported in by the committee was that at one place the word “committee” is substituted in place of “council” and that at another place the word “assaults” is substituted in place of the word “threats.” Whether this change was intentional or not, it can not be regarded in law as varying the order sufficiently to have same regarded as new matter. Unanimous consent was refused for the consideration of the new order and a motion to suspend the rules temporarily was then put and carried by a vote of 62 to 6 and thereupon the order was passed by a vote of 60 to 6.

The action of the City Council in suspending the rules in the face of the statutory provision above outlined was clearly invalid. The order is not and can not be regarded as being in force under the circumstances.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,
Corporation Counsel.

Exemption of Federal Government from Vehicle Tax.

October 27, 1915.

HON. CHARLES J. FORSBERG, City Collector.

Dear Sir:

Your communication of the 22d inst. wherein you request to be advised if the United States government is exempt from the payment of a vehicle tax on vehicles owned and operated by it in the City of Chicago, has been referred to me, and in reply beg to say:

In the case of *Fagan et al. v. City of Chicago*, 84 Ill. 227, where it was sought to assess for local improvements, land used by the Federal government as a postoffice and custom house, the court in refusing to sustain the assessment, said, at page 233:

“We apprehend that no rule is more uniformly recognized than that property of government is never taxed, unless expressly required by statute. It would only be to pay money from the treasury to be returned thereto. It could be of no kind of benefit. It would be entirely useless, and hence the government never requires such an act to be performed. Nor under our system of government can the states tax the general government, its agents or property, nor can the general government tax the states, their agents or property. See *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 576; *Osborn v. The Bank of the United States*, 9 Wheat. 738, 6 L. Ed. 204. In these cases it was held that the states have no power to tax the instrumentalities of the general government employed in the performance of its proper functions. * * *

In the case of *People ex rel. v. United States of America*, 93 Ill. 30, where it was sought to tax property where the title had been acquired by the United States under the general revenue law, the court in refusing to sustain the assessment, said at page 38:

“The moment the title to the property becomes vested either in the state or the United States, the property is no longer the subject of taxation. It does not seem it makes any difference whether the property is used

as a means or instrumentality for the execution of any of the powers of the Federal Government under the Constitution. It is sufficient if the title is in the United States,—the exemption from taxation attaches. *McGoon v. Scales*, 9 Wall. 23; *Railway Co. v. Prescott*, 16 *id.* 603.”

In the case of *Fagan et al. v. City of Chicago*, *supra*, the court said, at page 234:

“* * * A municipal corporation has no power to assess or exact from the state or the general government any sum for benefits conferred. The power to levy taxes or impose assessments for benefits can only be exercised on the governed, and not on the governing power, whether State or Federal. * * *”

I am, therefore, of the opinion that the City of Chicago has no power or authority to compel the United States government to pay a vehicle tax to operate its motor vehicles on the streets of the City of Chicago.

Very truly yours,

CHARLES E. PEACE,
Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,
Corporation Counsel.

License for Entertainment Carried on in Restaurant.

October 28, 1915.

HON. C. C. HEALEY, General Superintendent of Police.

Dear Sir:

We are in receipt of your communication in reference to Restaurant Royale, formerly Rector's, which conducts a performance for the entertainment of its patrons after the theatre each night. The question presented is whether the owners of this restaurant are bound to take out an amusement license.

It seems that the managers of the restaurant present

Mr. and Mrs. Vernon Castle in exhibition dances, besides permitting public dancing of the patrons, that a regular fee of twenty-five cents is exacted as a "couvert charge" from each person partaking of refreshments at the time such exhibition is given, and that the price is increased to fifty cents on Saturday and Sunday nights. No charge is made for "couvert" at any other time except when the dancing exhibition is going on. I have examined several of the menus prepared for this restaurant, and I find that there is also a slight advance in prices at the late suppers. The raise in the price of the refreshments, however, does not warrant the assumption that a fee for the entertainment is included, and the "couvert" charge is therefore the only one which could be regarded in the light of an admission fee.

Accompanying your letter is another letter, in which Mr. Elmer Schlesinger, of the law firm of Mayer, Meyer, Austrian & Platt, seeks to justify the "couvert" charge on the ground that a somewhat similar charge is made at other places, and in which it is contended that the case falls within the decision rendered by the New York Court of Special Sessions in the case of *People v. Martin*, 137 N. Y. Suppl. 677.

While it is true that some of the restaurants of the city are now charging a small fee of the character mentioned, it is claimed by them that such charge is for those articles of food which are ordinarily served free, and it is a charge that is imposed for this purpose at all hours and not limited to the time when these places, by reason of an exhibition of dancing, are more attractive than at other times. So large a charge at the Restaurant Royale at the particular time of the entertainment for so slight a service in itself indicates that it is imposed for the entertainment given rather than for the refreshments furnished.

The Martin case, on which so much reliance is placed, is far from convincing for several reasons. The ordinance in New York does not in terms define an amusement which requires a license as one operated for gain, although it

is true that the court draws the distinction between public exhibitions and others as depending on whether the primary purpose was pecuniary gain or whether it was given as an incident to some other legitimate pursuit. But in spite of this view of the court in a case where the ordinance makes no mention of gain or admission fee, I am of the opinion that under our ordinance it is not necessary that it be shown that the primary purpose is pecuniary gain.

Again, in that case great stress seems to have been laid on the exclusiveness of the exhibition, evidently with the object in view of proving it something else than a "public exhibition." It does not appear that any "couvert charge" or other charge peculiar to that place or hour was made. In fact the court says that "no admittance fee is charged."

Finally, the Martin decision is not in harmony with others in the same jurisdiction. In *Weistblatt v. Bingham*, 109 N. Y. Suppl. 545, it was held that a moving picture show in an ice cream parlor was a "common show" requiring a license, and the same ruling was made in the case of *Economopoulos v. Bingham*, 109 N. Y. Suppl. 728. In the first of these cases, the court, commenting on the fact that there was no charge for admission says:

"The plaintiffs have an ice cream saloon and candy store at Tompkins avenue and Floyd street, in this borough, the rear of which is fitted up with tables to accommodate 100 or more people and with a screen upon which are thrown moving pictures. While no entrance fee is charged for this exhibition, it is evident that it is conducted for the purpose of drawing trade and of gathering people into the place to purchase soda or ice cream while viewing the pictures. A person who came in and occupied one of the chairs at a table without ordering something I imagine would not stay very long. In this direct way a profit is made out of the moving picture show."

Mr. Schlesinger makes the following statement in his letter concerning the Restaurant Royale: "A couvert charge of twenty-five cents is made at supper only to persons actually ordering refreshments. No charge of any kind

is made for admission to the restaurant at any time. Any person is welcome to the restaurant free of charge and may witness the dancing of the Castles without paying one cent. It is only when a guest orders refreshments that the *couvert* charge is imposed."

In answer to that it can be said, much as the court said in the *Weistblatt* case, that any person who fails to order refreshments after coming into the restaurant to witness the dancing would probably find his stay short and uncomfortable.

The whole matter rests on the significance of this "*couvert* charge." If it could be shown that the charge is only intended as a part of the expense of a meal or other refreshments it would not place this restaurant in a different position than are others where entertainments are offered free to the guests. But I apprehend it would be hard for the managers of the place to establish this. I believe that in case of prosecution, while the matter is not absolutely free from doubt, the courts would be inclined to hold that the "*couvert* charge" is an admission fee under another name.

Besides what has already been pointed out as indicating that the "*couvert* charge" is really a fee for the entertainment, there is the further fact that the entertainment offered is in all respects similar to the ones offered at a number of places where an admission fee is charged directly and where an amusement license is taken out. Such places as the Bismarck and the Midway Winter Gardens provide the same kind of attractions, and to say that the Restaurant Royale may present them without an amusement license when a fee is actually charged constitutes a discrimination against places where the license is taken out.

Very truly yours,

RICHARD S. FOLSOM,
Corporation Counsel.

Certain Vending Machine a Gambling Implement.

October 28, 1915.

MR. FRED HOLMBERG, No, 6216 South Halsted Street, Chicago, Illinois.

Dear Sir:

We are in receipt of your letter of recent date in which you make inquiry concerning a vending machine that you have installed.

It appears from your letter that the machine consists of a stuffed hen, which, upon the deposit of a nickel, moves her head and lays an egg; that the machine is operated by depositing a nickel and the egg is a hard boiled egg which is thus sold to the person who deposits the nickel. You say that it is your desire to place a few colored eggs and one golden egg in the machine and to have a sign on the machine stating that a colored egg is good for a five-cent drink and the golden egg is good for a fifteen-cent drink, and you ask whether this would be in violation of the laws against gambling.

It would unquestionably be contrary to law to operate the machine as proposed. The law department of the city has often been called on to pass on vending machines operated on the same principle and it has invariably held that where a consideration is taken and a prize is offered as the result of a chance, in operating such machine, it comes within the definition of a lottery scheme. In this instance, while the prize appears to be small and the purchaser is in each instance given a fair return for his money, nevertheless the offering of prizes by the substitution of the colored and gold eggs, as set forth above, would be contrary to law and would subject the machine to confiscation as a gambling device.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,
Corporation Counsel.

Regulation of Private Banks.

October 29, 1915.

HON. OTTO KERNER, Chairman, Committee on Judiciary, etc.,
City of Chicago.

Dear Sir:

In response to your request for an opinion as to the power of the City of Chicago to regulate private banks, we submit the following:

The regulation of banks comes within the police powers of the state. It is sufficient to require the observance of the most rigid provisions, since banks are regarded as in their nature public institutions. The state has exercised this power so far as corporations organized under the banking law are concerned, but it has made no provision for the regulation of private banks, unless the power given to municipalities to tax, license and regulate money changers and brokers is to be regarded as a delegation of that power.

There are no authorities directly in point in this state which indicate how far the city may go in regulating private banks, but there are decisions which hold that the words "money changers," appearing in the grant of power above referred to, includes banks.

In the case of *Hinckley v. City of Belleville*, 43 Ill. 183, the court so construed the words and said, on page 184:

"Without considering the question as to how far a banker and a money broker are the same in the common parlance and business usages of this state, there is at least no doubt that the term 'banker' includes all the business of a money-changer. A money-changer is defined by Webster to be 'a broker who deals in money or exchanges.' The word has passed out of common use, but when used, we understand it in the sense given by the learned lexicographer. Thus defined, it is certainly included in the business of a banker, and constitutes, indeed, the greater part of it."

In the case of *Bull v. City of Quincy*, 9 Ill. App. 127, a similar interpretation was given those words. In some

of the states the power to tax and license private banks is directly given to municipalities, and when the power is exercised is upheld by the courts. It is but reasonable to assume that the Legislature did not intend the words "money changer" to apply to either pawnbrokers or any other kind of brokers, since special mention is made of those occupations. Consequently, the only inference to be drawn from the use of those words is that it was intended to cover the occupation of private banking. Such being the case, the power to regulate is complete. It does not conflict with any statute relating to banks or banking. These all refer to corporations organized under the banking law.

We are of the opinion, therefore, that such reasonable regulation as will not prevent persons from engaging in the business and is not discriminatory would be regarded as valid by our courts.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,
Corporation Counsel.

Maintenance of "Blackstone Point" as a Public Park.

October 30, 1915.

HON. WILLIAM R. MOORHOUSE, Commissioner of Public Works.

Dear Sir:

We are in receipt of your communication of September 8, 1915, enclosing a letter from Henry C. Morris, counsel for property owners on Lake Park avenue.

You ask to be advised if any change should be made in your verification report to the City Council under date of July 15, 1915, in which report, in conformity with our opinion of the same date, Blackstone Point, situated at Lake Park avenue, 49th street and Blackstone avenue, was not

included in figuring the total property frontage consent required with a petition for extension of a street car line in Lake Park avenue from East 47th street to East 55th street.

Mr. Morris asserts his belief that Blackstone Point should be included as park frontage in conformity with "the rule to include the frontage of city parks in petitions of this character."

At the outset we assume that it is mutually agreed that the law pertaining to property frontage consents does not apply to streets and street intersections.

Blackstone Point is a plot of ground that was dedicated by the original owners of the fee therein as a street and street intersection, which action was recorded May 8, 1857, in Book 133 of Maps, page 30.

The City Council at its meeting of November 21, 1904 (page 1604 of the Journal of the Proceedings of the City Council), vacated the property which comprises Blackstone Point for the purpose of beautifying the same and using this plot as a small public park, and, at the same meeting (page 1605) requested the Special Park Commission to take such steps as may be necessary to create and beautify same as a small public park. This was a qualified vacation, however, inasmuch as the said vacation ordinance specifically provided that, "should the said part of said street ever be used or attempted to be used for any other purposes, then this ordinance shall immediately become null and void and said part of said street shall thereupon immediately again become a public street of the City of Chicago."

The foregoing clearly indicates that it was not the intention of the City Council to divest this property of its original identity as a public street and street intersection, but merely to conditionally change the nature of its use. Hence, it follows that it must still be regarded as a street, which status it maintains in a dormant manner. Its use for park purposes can only be regarded in the nature of an easement for the benefit of the public. The fact that the City Council ordered this plot vacated, beautified and maintained by the Special Park Commission as a small park,

did not amount to an absolute vacation of the same as a street and street intersection. *Weage v. Chicago & Western Indiana Railroad Co.*, 227 Ill. 421.

The legal doctrine of "once a street always a street" is so fundamental and recognized so universally that its application to this matter will undoubtedly be conceded without citing any authorities to sustain the proposition.

Dillon on Municipal Corporations, Vol. 3, 5th Ed., page 1819, states in part as follows:

"Section 1150. STREET USES, PARKWAYS * * *.)

Although a street is ordinarily intended for purposes of public travel yet the municipal authorities in opening and laying out streets are not rigidly limited to that use. A street may in part unite the two purposes, one to furnish a *way for travel* and the other as a *park or public place*."

That the city possesses such legal power as stated above is laid down by the court in the case of *Murphy v. City of Peoria*, 119 Ill. 511, wherein the court states in part as follows:

"It is obvious * * * that the control of the streets, and the power to improve, is placed in the hands of the City Council, and in the exercise of these powers the manner of the improvement must, of necessity, to a large extent, be left to the discretion of that body. It is true, that the charter does not, in express words, declare that the City Council may grade and sod a portion of the street, but we think it is manifest that such power is included under the general authority to control and improve, conferred on the City Council by the charter. Where a street is of such a width that the entire street is not needed for the public travel, and the City Council deem it wise to sod a portion thereof, instead of graveling the entire street, we see no good reason why they may not properly, under the general power to control and improve, adopt that method of improvement."

In the case of public parks, such as Lincoln Park and the South Parks, the title to the land comprising same is by act of the Legislature vested in the park commissioners having jurisdiction over these parks. Said commission-

ers hold the fee in this land and, therefore, come within the contemplation of Paragraph 90 of Section 1, Article V, of the Cities and Villages Act (Hurd's Revised Statutes of 1913, page 275), relating to property frontage consents, wherein it provides among other things that "no petition of land owners shall be valid unless the same shall be signed by the *owners* of the land. * * *"

Since the park commissioners are vested with the title to the park lands under their control, they possess the authority to sign frontage consents in connection with such park property.

In view of the foregoing, it is our opinion that no portion of the property comprising Blackstone Point is to be regarded as property coming within the purview of the law relative to property frontage consents.

We return herewith Mr. Morris' communication.

Yours very truly,

JOHN A. COOKE,

Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,

Corporation Counsel.

Liability of City for Damages Caused by Falling Tree.

October 30, 1915.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

Your communication of recent date, together with council order and attached claim of Ashley O. Jones for damages sustained by him on the 30th day of May, 1915, by reason of a tree falling on the complainant's automobile, received.

Your request for an opinion as to the city's liability for said claim has been referred to me, and in reply I beg to say that investigation shows that the tree in question was a large willow tree situated directly in front of complainant's house. The tree was about two or three feet in

diameter, and appeared to be in healthy condition, but was decayed in the center with a thin layer of bark holding it up. The city had no information relative to this tree prior to the accident.

In the case of *Brennan v. City of Streator*, 256 Ill. 468, the plaintiff's cause was for damages for injury received by stumbling over an obstruction in a street, charged to have been negligently permitted to remain there by the defendant. The court said on page 471:

“* * * A municipal corporation is not under the obligation to keep its streets absolutely safe for persons passing over any part of them. Its duty is only to exercise ordinary care to keep its streets and sidewalks reasonably safe for persons using them who are themselves exercising ordinary care. * * *”

The case of *Jones v. Greensboro*, 124 N. C. 310, was an action for damages for personal injuries, occasioned by reason of a dead limb falling on plaintiff from a shade tree on sidewalk. The defense was that the defendant had no notice of the defective condition of the tree. The court on page 312 said:

“The corporation, however, is not liable without notice of the defect which caused the injury. This notice may be actual or implied. Implied notice may be from facts, from which it may be reasonably inferred, or from proof of circumstances from which it appears that the defect ought to have been known and remedied. Not only patent defects must be remedied, but reasonable care must be exercised to discover defects. For it has been well said that ‘negligent ignorance is not less a breach of duty than wilful neglect.’ So, whether constructive notice will be attributed to the city must depend upon the circumstances of each case. Nothing more than reasonable care to discover the defects will be required of the corporation. Notice will be inferred from the notoriety of the defect, open to reasonable observation, but if it be concealed or obscured in any way so as to escape the attentive observation on the part of the defendant, notice will not be attributed to it.”

Stanton v. Salem, 145 Mass. 476.

Cook v. City of Anamosa, 66 Ia. 427.

Mayor v. Sheffield, 4 Wallace (U. S.) 196, 96.

In the case of *Gubasco v. City of New York*, 1 N. Y. Sup. 215, where a decayed tree being struck by a heavy truck fell upon and injured the plaintiff, the court held that if the tree was dangerous but appeared safe, to outward observation, the defendant was not liable, and that the defendant was not bound to examine a hole which had existed on one side of the tree, although by so doing it would have discovered the decay.

Before the complainant can recover from the city, it must be shown that the city authorities had been notified of the condition of the tree, or such a state of circumstances must be shown that notice would be implied.

I am, therefore, of the opinion that the city has a good defense to the claim here in question.

Yours very truly,

CHARLES E. PEACE,
Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,
Corporation Counsel.

**Cost of Construction of Bridge at Wells Street to Be Borne
by Northwestern Elevated Railroad Company.**

November 1, 1915.

HON. W. R. MOORHOUSE, Commissioner of Public Works,
Chicago.

Dear Sir:

Your letter of October 22, 1915, to the corporation counsel wherein you request an opinion as to what extent the Northwestern Elevated Railroad Company would be liable for the cost of constructing a new bridge to replace the present bridge at Wells street has been referred to me for reply.

You state that it is expected that the Secretary of War may order the removal of the present center pier bridge at Wells street on account of obstruction to navigation.

The ordinance pertaining to the construction, maintenance and operation of the Northwestern Elevated Railroad was passed by the City Council January 8, 1894 (Council Journal, p. 1445), and was accepted by the company January 15, 1894. (Council Journal, p. 1513.)

Section 2 of said ordinance is as follows:

"Sec. 2. The said company may cross the main and south branches of the Chicago River, as provided in Section 1, with its main line and first branch line, either by means of a new bridge for such main line, and a new bridge for such first branch line, and which are hereby authorized to be constructed by it; or by means of a tunnel or tunnels under the main branch or south branch of the Chicago River, upon such plans and in such manner as shall be approved by the commissioner of public works; or at said company's option, by means of any one of the existing bridges now erected across the main or south branch of said river, excepting Lake street bridge; and for that purpose the said company may, at its own expense, rebuild and enlarge any such existing bridge, or bridges, upon such plan, and in such manner as shall be approved by the mayor and commissioner of public works; but the same as so rebuilt and enlarged shall not, nor shall such new bridge or bridges hereby authorized be so constructed as to unnecessarily obstruct navigation or drainage. Provided, that if any existing bridge is used it shall be so reconstructed as not to in any manner interfere with traffic as it now or may hereafter exist—and all expense of operating, repairing, and maintaining such bridge or bridges shall be borne by said Northwestern Elevated Railroad Company, its successors or assigns, during the life of this ordinance."

Section 17 provides that the railroad company shall execute to the city a good and sufficient bond "conditioned that it will observe, perform and carry out all the provisions of this ordinance, and will forever indemnify and save harmless the City of Chicago * * * from any and all damage * * * which it may suffer * * * for or by reason of or growing out of or resulting from the passage of this ordinance, or any matter or thing connected therewith, or with the exercise by said company of the privileges or any

of them herein granted, or from any act or acts of the said company under or by virtue of the provisions of this ordinance, etc.” .

It will be observed that said Section 2, of the ordinance provides that the company may cross the main and south branches of the river, either by means of a new bridge or bridges “which are hereby authorized to be constructed by it” or at the company’s option, “by means of any one of the existing bridges now erected across the main or south branch of said river, excepting Lake street bridge; and for that purpose the said company may, at its own expense, rebuild and enlarge any such existing bridge, * * * but the same as so rebuilt and enlarged shall not, nor shall such new bridge or bridges hereby authorized, be so constructed as to unnecessarily obstruct navigation or drainage. Provided, that if any existing bridge is used it shall be so reconstructed as not to in any manner interfere with traffic as it now or may hereafter exist—and all expense of operating, repairing and maintaining such bridge or bridges shall be borne by said Northwestern Elevated Railroad Company, etc.”

Under the foregoing section the company might, at its option, make use of the then existing bridge at Wells street after making the necessary alterations and repairs, or it might construct a new bridge. In either event the company would have to bear the expense.

It is further provided that should a new bridge be built or an old bridge enlarged or reconstructed by the company for the use of its tracks, in either event “the same as so rebuilt and enlarged shall not, nor shall such new bridge * * * hereby authorized be so constructed as would unnecessarily obstruct navigation or drainage.”

It is further provided that “if any existing bridge is used it shall be so reconstructed as not to in any way interfere with traffic as it now is or may hereafter exist,” and that all expense of operating, repairing and maintaining “such bridge or bridges” shall be borne by the company.

We are of the opinion that under the foregoing section of the ordinance the company is entitled to the use and enjoyment of the bridge in question so long as such bridge does not unnecessarily obstruct navigation or drainage. The matter of obstruction or non-obstruction of navigation and drainage being a question of fact, we express no opinion concerning the same.

We believe that, if the present bridge should be declared an obstruction to navigation and drainage, and in consequence thereof the Secretary of War should order it to be removed, under the ordinance in question if the elevated railroad company should desire the construction of a new bridge to be used by it at Wells street, it would be obligated to bear the entire expense thereof.

West Chicago Railroad Co. v. City, 201 U. S. 506.

But it would, of course, not be obligated to construct a bridge for the use of a city.

The subject of the city constructing a new bridge which would be occupied by the elevated railroad company as well as general traffic, is not covered by the provisions of the ordinances to which reference has heretofore been made, and that question is, therefore, open to new negotiations between the elevated railroad company and the city, and before the company would be entitled to use the new bridge it would be obligated to pay to the city such amount as the city should demand as its reasonable proportion of the cost of a bridge to bear such double traffic based upon the increased cost of the bridge over what it would have cost to bear street traffic alone.

Yours truly,

ROY S. GASKILL,
Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,
Corporation Counsel.

Right to Operate Skee Ball Alley.

November 1, 1915.

HON. HERMAN F. SCHUETTLER, Acting Superintendent of Police.

Dear Sir:

You referred to this department the question of whether the game known as "skee ball" may be operated in such a way that persons who make high scores can be given prizes.

The game in question is played by means of balls much lighter than the ordinary bowling balls. There is an alley over which the ball runs which contains a hump that causes the ball to leap high in the air somewhat in the manner of the "ski jumpers" in Sweden and Switzerland. This alley is only 20 feet in length, and the jumping of the ball is more or less a matter of chance. At the end of the alley is a target containing pockets which are numbered 10, 20, 30, 40 and 50.

The question necessarily hinges on whether the jumping of the ball constitutes such a chance as would have the effect of taking the game out of the category of "games of skill" and placing it among those which are to be construed as "games of chance." The prizes offered are such things as nickeled lead pencils, neckties, pocketbooks, beer steins, etc.

In order to ascertain whether or not the running up of a large score depends on the skill of the operator, the writer took occasion to investigate it personally. The manner in which it is proposed to conduct the game is through the means of a slot device by which 9 balls are given to the person who places a nickel in the slot. These balls are made of wood and are about twice as large as the ordinary baseball. It seems to require considerable force to send the ball over the alley so as to make it jump high enough to strike one of the pockets designated with the larger numbers and, in fact, to play the game properly involves a mild form of exercise.

It is hard to distinguish between gambling games and games of skill, in view of the fact that many games which are classed by the statute as gambling games involve skill. The playing of cards and billiards requires skill and at the same time they are regarded as gambling games, when money is staked on the outcome of same. Nevertheless, the distinction is usually drawn along these lines. On the other hand, few, if any, of the games which are recognized as legitimate are of such a character that the element of chance is entirely eliminated. It plays a considerable part in baseball, lawn tennis, bowling and almost every other game that could be mentioned.

The writer is satisfied that a person who frequently plays and knows how to send the balls over the alley so as to make good jumps in a straight line with same can run up a high score, while a novice would seldom get a large enough score to entitle him to a prize. The game unquestionably requires study and practice and at the same time is interesting and healthful apart from any prize that is offered.

It is worthy of note that a group of interested spectators stops to watch the game wherever it is played, the whole arrangement being one which by its novelty and the competitive features afford interest and is attractive to the observers.

In our opinion it would be extending the interpretation of the laws against gambling to an unwarranted degree to assume that because prizes are awarded to those who make high scores the game is contrary to law. It might be the vehicle of gambling transactions as most any game would be in case persons bet on the result, but if played as it seems to be the intention of the promoters of this game to play it, there could be no objection to it from a legal standpoint.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,

Corporation Counsel.

Ordinance Limiting Washing Outside of Windows in Loop to Certain Hours.

November 1, 1915.

TO THE HONORABLE, THE CITY COUNCIL OF THE
CITY OF CHICAGO.

Gentlemen:

On October 25, 1915, your Honorable Body passed the following order:

“*Ordered*, That the corporation counsel be and he is hereby directed to render to this Council at its next meeting an opinion as to the power of the City Council to pass an ordinance, or ordinances, to provide that the work of washing the outside of windows or buildings in the ‘Loop’ district shall be limited to certain hours of the day or night, and to regulate the manner of doing said work, with a view to minimizing the danger of accidents to pedestrians.”

Pursuant thereto we respectfully submit the following opinion:

Among the powers conferred upon cities by Section 1 of Article V of the Cities and Villages Act (Chap. 24 R. S.) are the following:

“Seventh. To lay out * * * pave or otherwise improve streets * * *.

“Ninth. To regulate the use of the same.

“Fourteenth. To regulate the use of sidewalks * * *.

“Sixty-sixth. To regulate the police of the city * * * and pass and enforce all necessary police ordinances.

“Seventy-fifth. To declare what shall be a nuisance and to abate the same; and to impose fines upon parties who may create, continue or suffer nuisances to exist.”

Our Supreme Court has held that under clause “Seventh” aforesaid, plenary power as to streets and alleys is delegated to the municipality. (*Saunders v. City of Chicago*, 212 Ill. 206-216.)

Under clause "Ninth" aforesaid, the power to regulate the control of streets of municipalities in this state is delegated to the municipal authorities.

Peoria Railway Company v. Peoria Terminal Co.,
252 Ill. 73-83.

Commonwealth Electric Co. v. Rose, 214 Ill. 545-560.

City of Anna v. Boren, 77 Ill. App. 408-410.

Concerning the powers of the municipality as enumerated in said Article V of the Cities and Villages Act, our Supreme Court in the case of the *People v. Clean Street Co.*, 225 Ill. 470, said, on page 479:

"It will be seen that the control over the streets and alleys of a city or village, under this statute, is very broad, and absolute power over them is vested in the municipality. But the authority is not vested in the mayor, chairman of the committee on finance or commissioner of public works, but is conferred upon the legislative branch of the city government. In other words, it is vested in the City Council, and can only be exercised by it through ordinances duly passed. The ordinances may, of course, be enforced or carried into effect after they are so passed, by the mayor or other officials designated for that purpose."

Referring to the powers of the municipality over streets and sidewalks under clause "Fourteenth" aforesaid, our Supreme Court in the case of *Chicago Cold Storage Co. v. The People*, 224 Ill. 287, said, on page 291:

"There can be no question but that the title to all sidewalks is vested in the city in trust for the public, and under the above section of the City and Village Act they are under the control, supervision and dominion of the city council. But this control is not absolute, but must be exercised according to certain well established rules and principles. The primary use of the streets and alleys of a city is for the benefit of the public, so they may have free and unobstructed access to and travel over the same."

In relation to the powers of the city under clause "Sixty-sixth" aforesaid, our Supreme Court in the case of *Spiegler v. City of Chicago*, 216 Ill. 114, said, on page 126:

“By the City and Village Act the City of Chicago is given power to pass and enforce all necessary police ordinances. By the word ‘necessary,’ indispensable was not intended, but power was conferred upon the city to pass all ordinances which would be conducive to the promotion of the health, safety and welfare of its inhabitants.”

In construing clause “Seventy-fifth” aforesaid, our Supreme Court has said that the City Council may, by ordinance, conclusively denounce as nuisances trades and callings which may or may not be such in their nature, but which became so by reason of location, surroundings and the like. (*Laungel v. City of Bushnell*, 197 Ill. 20.)

In the *Laungel* case, *supra*, the court on page 26, quoted the following from the case of *North Chicago City Railway Company v. Town of Lake View*, 105 Ill. 207:

“In doubtful cases, where a thing may or may not be a nuisance, depending upon a variety of circumstances requiring judgment and discretion on the part of the town authorities in exercising their legislative functions under a general delegation of power like the one we are considering, their action under such circumstances would be conclusive of the question.”

And again on page 27, the court said:

“In the case at bar the grant of legislative power to declare what shall be a nuisance, and to abate it, is expressly given, and no doubt exists as to the power of the City Council over nuisances.”

We are of the opinion that the City Council possesses ample power under the various clauses of Article V of the Cities and Villages Act above set forth to regulate the manner of and the hours within which the washing of the outside of windows or buildings in the “Loop” district may be done.

Yours very truly,

ROY S. GASKILL,

Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,

Corporation Counsel.

**Respective Liabilities of Contractor and Adjacent Owners,
Concerning Substructure of Bridge.**

November 1, 1915.

HON. W. R. MOORHOUSE, Commissioner of Public Works.

Dear Sir :

In response to your request of October 29, 1915, for an opinion concerning the respective responsibilities of the contractor for the sub-structure of the Monroe street bridge and the owners of the buildings adjacent to said work, we advise you that the line of demarcation to be drawn dividing these respective responsibilities is one based upon the proposition that the owners of the buildings in question are entitled to the lateral support of the street for the soil of their respective properties as that soil existed in its natural state, and that the right of lateral support does not extend to the support of any additional weight which the owner of the soil may place upon it in the form of buildings.

Authority for this proposition is to be found in *Nevins v. City of Peoria*, 41 Ill. 502 and *City of Quincy v. Jones*, 76 Ill. 231, and in the latter case the court held that the same limitation applies between an individual owner of a lot and a city as to lots abutting upon a public street of the city.

The city has, by the specifications which are a part of its agreement with the contractor for the substructure, placed upon such contractor the full duty of discharging any obligation that may devolve upon the city to afford lateral support for the soil of the property abutting Monroe street, and has even gone beyond discharging its obligation to the abutting property owner by requiring the contractor to

“take all necessary precautions for the protection of walls and foundations of buildings, tunnels and any other structure contiguous to the excavation or cofferdams and sub-piers, and shall support and maintain all such structures in a safe and secure manner through-

out the period of construction of the foundations and until the completion of the work under the contract. Damage done to any structure, caused by or resulting from the work or neglect of the contractor, shall be repaired in the best possible manner, and the structures left in a permanently safe and secure condition, free of cost or liability for loss or damage on the part of the company."

It is thus seen that the contractor has taken upon himself an obligation greater than that imposed by law upon the city. So that it cannot be said that the contractor has discharged his duty under the terms of the contract by furnishing lateral support to the soil of the adjoining property in its natural state, but on the contrary, the contractor is obligated to support not only the soil in its natural state, but the additional burdens in the form of buildings placed upon it by the respective owners on their respective properties.

Yours truly,

CHARLES M. HAFT,
First Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,
Corporation Counsel.

Leasing of Municipal Pier.

November 2, 1915.

HON. N. C. SHANKLAND, Chairman, Harbor and Subway Commission.

Dear Sir:

Complying with your request of October 20, 1915, for an opinion from this department as to the proper authority and officials to make leases of freight and passenger space on the municipal pier in Harbor District No. 1, I submit the following:

Section 3 of the Harbor Act provides as follows:

"§ 3. Every such city and village shall have the

power to lease portions of any of the utilities mentioned in Section 1 of this act, for a period not longer than twenty (20) years on such terms and conditions as shall be prescribed by ordinance, and to fix and regulate the rates and charges for the use of such utilities, whether owned and operated by such city or village, or are operated by persons or corporations who are tenants of such city or village, or are constructed, owned and operated by any public or municipal corporation as hereinafter provided: *Provided, however*, that except as to railroad facilities at least one-third of the capacity of each such utility shall not be leased for a period to exceed one year and that at least one-half of said one-third shall at all times be reserved by such city or village for general public use, and that not to exceed fifty per cent in capacity of the remaining two-thirds capacity of each such utility shall be leased to any one person or corporation: *Provided, further, however*, that no leases authorized under this act shall contain conditions which shall admit of any unjust, undue or unreasonable preference or discrimination between lessees."

From the foregoing it appears that no leases shall be for a longer period than twenty years and that the same are to be made on such terms and conditions as shall be prescribed by ordinance. This means that the leasing will be within the control of the City Council, which body is clothed with power to fix and regulate the rates and charges for the use of the harbor utilities, provided that no leases shall admit of any unjust, undue or unreasonable preference or discrimination between lessees.

Except as to railroad facilities, one-sixth of the harbor utilities shall at all times be reserved for general public use; another one-sixth may be leased for periods not exceeding one year, and not to exceed fifty per cent in capacity of the remaining two-thirds of each utility shall be leased to any one person or corporation.

Section 11 of the Harbor Act provides as follows:

"§11. No ordinance of any such city or village providing for the leasing of any portion of any harbor, wharf, dock, pier, quay wall, slip, levee, connection or other harbor utility acquired or constructed under the provisions of this act (and authorized by this act to

be leased), for any period in excess of five years, shall go into effect until ninety days after the passage thereof, and if within such ninety days a petition shall be filed in the office of the city or village clerk of such city or village, signed by five per cent (5%) of the registered voters of such city or village as shown by the last preceding general election held in such city or village, requesting that such ordinance be submitted to popular vote, it shall be the duty of said city or village clerk within three days after the filing in his office of such petition, to file the same, together with a copy of the ordinance, certified by said city or village clerk to be a true copy thereof, in the office of the officer or officers having jurisdiction over elections in such city or village, and it shall thereupon be the duty of such election officer or officers to submit to the electors of such city or village, in the same manner as is provided by section two of an act entitled, 'An Act providing for an expression of opinion by electors on questions of public policy at any general or special election,' approved May 11, 1901, at the first succeeding general or special election occurring more than ninety days thereafter or at a special election called by the City Council of such city or village for that purpose in the manner provided by Article IV of an Act entitled, 'An Act to provide for the incorporation of cities and villages,' approved April 10, 1872, the question of whether or not such ordinance shall be approved and such ordinance shall not go into effect until it shall have been approved by a majority of the electors voting thereon at such general or special election: *Provided, however,* that each ordinance providing for such leasing shall have a true copy of such proposed lease thereto attached."

From the foregoing section it is apparent that an ordinance providing for leases for any period in excess of five years shall not go into effect until ninety days after the passage thereof, and not then if a petition for a referendum on such leases shall have been filed with the city clerk as in such section provided. If such petition is filed, a lease can only become effective upon approval by a majority of the electors voting thereon, as provided in said section. This makes it apparent that if ship companies wish to enter

into the use and occupation of portions of the pier at the opening of the lake season next spring, it will be necessary to promptly pass an ordinance providing for the execution of leases, in order that the ninety-day period may run and expire before the opening of such season; otherwise it will be necessary for each such company or lessee to enter into a short term lease, which will not be subject to the referendum provisions of Section 11, and then later the council can pass an ordinance providing for the longer term lease, if such longer term is desired. This will permit of the operation of the referendum provisions of Section 11 during the period of the short term lease.

An amendment to Rule 44 of the Rules of Procedure of the City Council, passed May 10, 1915, provides as follows:

“All matters authorizing or granting private uses or special privileges in any street, alley, public dock, pier or other public ground, or providing for the vacation thereof, excepting franchises for public utilities, shall be referred by the respective committees to which they have been referred for consideration, to the committee on compensation for the purpose of fixing the amount of compensation to be paid before such matters are reported to this council by said committees.”

From the foregoing I am of the opinion that requests for information as to leasing of freight or passenger space or of any of the utilities of the pier should be referred to the City Council; that thereupon said body will refer such matter to its appropriate committee, and that this committee will then refer all matters of rates, charges or compensation to the committee on compensation to consider and pass upon such questions.

Section 36 of The Chicago Code of 1911 authorizes the city comptroller to execute any and all leases of real property whenever it is deemed advisable that the property of the city should be leased. This function of the city comptroller will be exercised after the City Council has by ordinance approved the pier leases. Section 24 of the code

makes the city comptroller custodian of the leases after execution.

Respectfully submitted,

JAS. S. SKINNER,
Assistant Corporation Counsel.

Approved:

CHARLES M. HAFT,
Acting Corporation Counsel.

**Civil Service Employee Removed or Reduced in Salary on
Account of Insufficient Appropriation.**

November 2, 1915.

MARVIN J. SCHABERG, Esq., City Attorney, Kalamazoo, Michigan.

Dear Sir:

We are in receipt of your letter of October 27, 1915, requesting us to send you information concerning a late decision of the Supreme Court of Illinois, in which it was held that a civil service employe could be removed or reduced in salary without the consent of the civil service commission where the appointing power had not received sufficient appropriation to pay his salary.

There is only one decision of our Supreme Court which closely touches upon this point and that is the case of *Fitzsimmons v. O'Neill*, 214 Ill. 494, which was decided February 21, 1905. The court, at page 503, said:

“The appellant contends that the removal was illegal, because no written charges were made against him, and he had no opportunity to be heard in his own defense. We are of the opinion that Section 12 of the Civil Service Act has no application to a case like the present. That section refers to cases where an officer or employe is removed for some reason personal to himself. His right to be heard in his defense upon written charges, as specified in Section 12, implies that the cause of his removal is some dereliction, or neglect of duty, or incapacity to perform duty, or some delinquency, which affects his fitness for the position occu-

pied by him. The provision in question does not apply to a case where the incumbent is dismissed for want of funds, or in order to reduce expenses, and when at the time of the dismissal, as was the fact in the case at bar, he has notice of that fact."

The court again, at page 504, said:

"And, further, the statute does not apply to a case like this where the officer is removed, not to make way for another, but because his services are no longer needed, or because there are no funds provided for his payment. The plain purpose of the statute does not reach such a case."

And again, at page 508, the court said:

"No question is made here as to whether or not appellant was the proper person to be laid off first in case of a removal from the office of foreman of the repair shop in the Police Department. The material fact is that the power of removal for lack of funds is recognized by the rules of the Civil Service Commission as existing in the city bureaus."

To the same effect are:

City of Chicago v. Byrne, 114 Ill. App. 145.

City of Chicago v. The People, 136 Ill. App. 296.

The Civil Service Act of this state was passed for the purpose of providing that appointments and removals of officers and persons in the service of the city should be according to merit and fitness.

Kipley v. The People, 171 Ill. 44.

Fitzsimmons v. O'Neill, *supra*.

This Civil Service Act did not purport to create and does not create any offices and places of employment.

Bullis v. City of Chicago, 235 Ill. 472.

The power to create all offices and places of employment and regulate the compensation thereof in this state is vested in the City Council or the Board of Trustees as the case may be, except where otherwise provided by statute.

The Civil Service Commission, therefore, has no authority over the number of offices and places of employment nor the compensation incident thereto, and any change therein is not a violation of our Civil Service Act.

If you care for a copy of the decision in the case of *Fitzsimmons v. O'Neill*, 214 Ill. 494, you can obtain a certified copy from the clerk of the Supreme Court of this state, whose address is Springfield, Illinois.

Yours very truly,

JOHN E. FOSTER,

Assistant Corporation Counsel.

Approved:

CHARLES M. HAFT,

Acting Corporation Counsel.

**Separate Licenses for Public Automobiles Which do not
Stand on Public Cab and Hack Stands.**

November 2, 1915.

HON. CHARLES J. FORSBERG, City Collector.

Dear Sir:

Your communication of recent date wherein you state a person owns two or more automobiles which he keeps in a licensed garage, not his own, for the purpose of carrying or conveying passengers for hire or reward. You further state that these vehicles do not stand on any public stand or street for the purpose of soliciting or securing employment.

Your request for an opinion as to whether or not it is necessary for a person operating vehicles as above stated to take out a separate license for each automobile, or if one license at a fee of five dollars is sufficient to cover all vehicles operated by such a person, has been referred to me, and in reply I beg to state as follows:

Section 2663 of The Chicago Code of 1911 provides:

“LICENSE REQUIRED—VEHICLES EXCEPTED.) No person or corporation owning any hack, cab, omnibus, car-

riage or other vehicle of any description or name whatever, drawn by one or more horses, or any automobile, autocar or other similar self-propelled vehicle, which shall be used anywhere within the city for the carrying or conveying of persons for hire or reward, shall use or permit to be used any such vehicle anywhere within the city, without first obtaining a license so to do in the manner hereinafter set forth; provided, however, that nothing herein contained shall be construed as having any application to livery, boarding or sale stable keepers, or to garages, as hereinafter defined in this chapter, nor to the owners of vehicles which shall stand or be kept upon any public cab or hack stand upon any street or public way in the city for soliciting or securing employment; nor shall any license granted herein be authority for any licensee to conduct a livery, boarding or sale stable, or garage, or to stand any vehicle on any public cab or hack stand on the streets or public ways of the city for the purpose of securing or soliciting employment."

Section 2664 of The Chicago Code of 1911 also provides:

"APPLICATION—LICENSE FEE—PERIOD.) Any person desiring to keep any public vehicle of the class defined in the foregoing section hereof shall make application for a license so to do to the mayor on a form to be provided by the city collector. Such application shall set forth the name of the applicant, and, if an individual or individuals, the place of his or their residence; if a corporation, the names of its officers and their places of residence. Such application shall also contain a statement of the location of the place at which it is intended to keep such vehicle or vehicles and the number of vehicles so kept, together with a description of the style or type thereof. The mayor shall thereupon issue or cause to be issued a license upon the payment by such applicant to the city collector of a license fee of five dollars per annum, which said license shall expire on the thirty-first day of December following the date of issue."

I am, therefore, of the opinion that a separate license fee of five dollars should be required for each automobile owned and operated by the person who keeps his automo-

biles in a licensed garage for the purpose of carrying or conveying persons for hire or reward.

Yours very truly,

CHARLES E. PEACE,
Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,
Corporation Counsel.

Rights of Discharged Employee to Refund from Municipal Pension Fund.

November 3, 1915.

TO THE BOARD OF TRUSTEES OF THE
MUNICIPAL PENSION FUND, CITY OF CHICAGO.

Gentlemen:

We are in receipt of your favor of November 3, 1915, asking for a written opinion as to the rights of employes to a refund where such employes were separated from the service of the city prior to July 1, 1915, under the amended act, or who were off the payrolls for any reason and who did not keep their payments into this fund paid up, and who have since July 1, 1915, resigned, died or been discharged.

We beg to advise you in reply that Section 1 of the Municipal Pension Fund Act expressly provides that employes whose names do not appear upon the payroll of the department by reason of leave of absence, sickness, lack of work or any good and sufficient cause, making a deduction by the comptroller impossible, may retain their rights under the act by paying two dollars each month.

Only persons who contribute monthly the sum of two dollars to the pension fund can be considered as participants in this fund. Where participants leave the employ of the city and do not contribute two dollars per month to the pension fund, their failure so to do renders it impossible for them to retain any rights under the pension act. To entitle

persons to a refund under the amended pension fund act, they must be participants in the fund at the time such separation occurs, either by resignation, discharge or death, and must have contributed to the fund up to that period. Failure on the part of participants in this fund to contribute two dollars per month when they are not in the employ of the city so as to enable the comptroller to deduct the sum of two dollars from their salary or wages, automatically removes them as participants in said fund, and results in their forfeiture of all rights in said fund.

Respectfully submitted,

JAMES W. BREEN,
Assistant Corporation Counsel.

Approved:

CHARLES M. HAFT,
Acting Corporation Counsel.

Status of Morgan Park School Employees.

November 4, 1915.

HON. WM. HALE THOMPSON, Mayor.

Dear Sir:

There has been placed before us a petition addressed to you by the residents of the portion of the city formerly known as Morgan Park seeking to have the present engineer custodians of the Morgan Park High School, the Morgan Park Elementary School and the Morgan Park Branch School retained in their present places, although they have failed to pass the examination provided by the Civil Service Commission for such positions.

The petition is signed by a large number of persons, apparently including about all the people in that territory, and was presented by the aldermen of the Thirty-second ward, where these schools are located. The petition states, among other things, that the chief engineer of the Chicago Public Schools says that the services of these men have been very satisfactory while under his jurisdiction, that they were

employed nineteen, eleven and seven years respectively, and that their interest in the upkeep of the buildings and grounds and in looking after the welfare of the pupils in the schools has been unusual.

These men have been notified by the Civil Service Commission that they would be dismissed. In view of the wishes of the people in that locality and what appears to be the general desire of all parties interested to retain these men, a difficult question is presented.

This department gave an opinion to the Civil Service Commission on May 2, 1914 (see Opinions 1913-14, p. 828), to the effect that the only employes taken over automatically when annexation was effected were the policemen and firemen of the village. By a familiar canon of construction, the provision in the Annexation Act which transfers policemen and firemen in annexed territory to the city's service must be held to exclude all other employes not specifically mentioned.

The only theory under which the employes in question could be taken in would be on the assumption that they were in the employ of the city at the time the Civil Service Act became operative in the territory in which they were employed. If that holds good in law they would be entitled to the rights, if any, of holdovers. None of them were employed by the Village of Morgan Park or any school district covering that territory at the time the act went into effect in the City of Chicago.

The so-called "rights" of holdovers were always of such an uncertain nature that practically all persons employed by the city at the time the law went into effect took advantage of an early opportunity afforded them to establish themselves in a civil service rank and grade so as to bring them regularly within the classified service as duly certified employes. The result is that such questions as here presented have not been completely threshed out, although the law has been in force over twenty years. Numerous cases may be cited to the effect that holdovers are not entitled to the rights of certified employes with respect to removal or the necessity of filing charges, etc. But

the precise questions here involved, viz., the right of the Civil Service Commission instead of the appointing power to discharge a holdover, and the right of persons within newly annexed territory to claim their positions as holdovers, have not been passed on.

The late Judge Tuley, in *Mather v. Kerfoot*, Ch. Law Journal, June 8, 1900, p. 130, held that when the Civil Service Law went into effect all officers and employes were holdovers and that they were entitled to the benefits of same. This ruling was based, however, on the manifest intention of the Legislature to have the act take effect at once and was at best a very liberal construction of the act for the benefit of such holdovers. It has not been followed in later cases so far as the right to trial before discharge is concerned. (See *Stott v. City*, 205 Ill. 281; *McNeil v. City*, 212 Ill. 481; *Kenneally v. City*, 220 Ill. 485; *People v. City*, 242 Ill. 561.)

While the above decisions dispose of the question of whether the holdover can be discharged without a hearing, they do not touch the question as to whether the holdover can be discharged by any one except the appointing power. Therefore, we say that the two questions mentioned above have not been finally settled.

Such being the case, if it is the desire of the Civil Service Commission to defer to the wishes of the signers of the petition, we would not say that it is beyond question unlawful for the commission to refrain from discharging them until the Board of Education dismisses them. It is contrary to our view of the law, but we feel that, in response to so general a demand for their retention, it would do no harm to let the three employes remain until the courts pass on these two questions, since they have not been finally decided and there may be some ground for holding otherwise.

We return herewith the petition mentioned above.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

CHARLES M. HAFT,
Acting Corporation Counsel.

Constitutionality of Police Pension Act.

November 5, 1915.

HON. ELLIS GEIGER, Alderman of the 21st Ward.

Dear Sir:

We beg to acknowledge receipt of your favor of October 26, 1915, asking this department for an opinion as to the constitutionality of the Police Pension Fund Act, and in particular as to the constitutionality of Section 9, in regard to whether or not it is a violation of Section 13 of Article IV of the Constitution because it amends the revenue act, or one of its sections, without amending the section at length.

In reply to your communication, we beg to advise you that you are in error when you assume that the Police Pension Fund Act, passed by the last General Assembly, or any section thereof, amends the revenue act or any of the sections of the revenue act. It is the well recognized law of this state that if an act of the General Assembly is complete in itself and intelligible, showing by itself just what it is, it will not be held to be an amendment to any prior act so far as the constitutional questions are concerned, but will be considered a separate and distinct statute.

Section 13 of Article IV of the Constitution provides, in part, as follows:

“No act hereafter passed shall embrace more than one subject, and that shall be expressed in the title * * * and no law shall be revived or amended by reference to its title only, but the law revived or the section amended shall be inserted at length in the new act.”

The title of the Police Pension Fund Act, approved June 29, 1915, in force July 1, 1915, recites that it is “An Act to provide for the setting apart, formation and disbursement of a police pension fund in cities having a population exceeding two hundred thousand inhabitants,” and the entire

act relates solely to the manner of the formation and of the disbursements of the police pension fund; and Section 9 of said act provides how the amount of said pension fund shall be determined, what the said pension fund shall consist of, and how the said fund shall be raised.

The first thing for us to consider is whether or not the enactment of this act is a violation of Section 13 of Article IV of the Constitution, and we beg to advise you that the rule has long been established by the Supreme Court of this state that this clause of the Constitution was not intended to forbid every enactment which in any degree, however remotely, might affect prior laws on a given subject. A subsequent act may have the practical effect of amending a prior one, or it may be substituted for it, without violating the Constitution. This doctrine has been adhered to by the Supreme Court of our state in *People v. Election Commissioners*, 221 Ill. 9; *Badenoch v. City of Chicago*, 222 Ill. 71. This same question was raised in the case of *People ex rel. Wright*, 70 Ill. 388, and Mr. Justice Scholfield, discussing this same clause of the Constitution, on page 396, said:

“No particular section of any act purports to be amended by this act. All that can be said of it in this respect is, that, by implication, it amends the municipal charters of cities. It can not be held that this clause of the constitution embraces every enactment which, in any degree, however remotely it may be, affects the prior law on a given subject, for, to so hold, would be to bring about an evil far greater than the one sought to be obviated by this clause. Our views on this question are fully and well expressed by the Supreme Court of Michigan, in *People v. Mahoney*, 13 Mich. 484. The court there said: ‘If, whenever a new statute is passed, it is necessary that all prior statutes modified by it, by implication, should be re-enacted and published at length as modified, then a large portion of the whole code of laws of the state would require to be re-published at every session, and parts of it several times over, until, from mere immensity of material, it would be impossible to tell what the law was. If, because an act establishing a police government modifies the powers and duties of sheriffs, constables, water and

sewer commissioners, marshals, mayors and justices, and imposes new duties upon the executive and the citizen, it has thereby become necessary to re-enact and republish the various laws relating to them as modified, we shall find, before the act is completed, that it not only embraces a larger portion of the laws of the state, but also that it has become obnoxious to the other provisions referred to, because embracing a large number of objects, but not one of which can be covered by its title.

“ ‘This constitutional provision must receive a reasonable construction, with a view to give it effect. The mischief designed to be remedied was, the enactment of amendatory statutes in terms so blind that legislators themselves were sometimes deceived in regard to their effect, and the public, from the difficulty in making the necessary examination and comparison, failed to become apprised of the changes made in the laws. An amendatory act, which purported only to insert certain words, or to substitute one phrase for another, in an act or section, which was only referred to, but not republished, was well calculated to mislead the careless as to its effect, and was, perhaps, sometimes drawn in that form for that express purpose. Endless confusion was thus introduced into the law, and the constitution wisely prohibited such legislation. But an act, complete in itself, is not within the mischief designed to be remedied by this provision, and can not be held to be prohibited by it without violating its plain intent.’ ”

The next question for us to determine is, whether or not this act is in violation of that part of Section 13 of Article IV, which provides that “No act hereafter passed shall embrace more than one subject, and that shall be expressed in the title.” This provision of the Constitution has been uniformly construed liberally by the Supreme Court of our state in favor of the validity of enactments.

Blake v. The People, 109 Ill. 504.

When a general purpose is declared, the means by which to accomplish that purpose are presumed to be intended as necessary incidents, and any means which are

reasonably adapted to secure the object indicated in the title may be included in the act.

People v. Hazelwood, 116 Ill. 319.

Larned v. Tiernan, 110 Ill. 173.

If by any fair intendment the provisions in the body of the act have a necessary or proper connection with the title, it can not be said that the act violates the Constitution.

Hudnall v. Ham, 172 Ill. 76.

To render a provision in the body of an act void, as not embraced in the title, such provision must be incongruous with the title or must have no proper connection with or relation to the title.

People v. McBride, 234 Ill. 136.

If all the provisions of an act relate to one subject indicated in the title, and are parts of it or incident to it, or reasonably connected with it, or in some reasonable sense auxiliary to the object in view, then the provision of the Constitution is obeyed.

Ritchie v. The People, 155 Ill. 98.

Boehm v. Hertz, 182 Ill. 154.

Christy v. Elliott, 216 Ill. 31.

An act may contain many provisions and details for the accomplishment of a legislative purpose, and if they legitimately tend to effectuate that object the act is not contrary to the constitutional provision.

Town of Manchester v. People, 178 Ill. 285.

Meul v. The People, 198 Ill. 258.

Christy v. Elliott, 216 Ill. 31.

People v. McBride, 234 Ill. 136.

The next question for us to consider is the power of the General Assembly to enact this law under our Constitution. In the case of *The Firemen's Benevolent Association v. Wales B. Lounsbury*, 21 Ill. 510, which involved

the constitutionality of an act levying a tax on foreign fire insurance companies for the relief of the distressed, sick, injured or disabled members of the Firemen's Benevolent Association of Chicago and their immediate families, Mr. Chief Justice Caton delivered the opinion as to the power of the General Assembly under our Constitution, and, on page 513 of said opinion, said:

"The general grant of legislative power, found in the Constitution confers upon the General Assembly all legislative power, and authorizes the law-makers to pass any laws and do any acts which are embraced in the broad and general word *legislation*, as known and defined in the English language. It authorizes the passage of any law which could be enacted in the most despotic government. It even authorizes everything which the people could enact in their primary capacity. Anything which they would have a right to embody in the Constitution itself. After this broad grant of legislative power, the Constitution in various provisions proceeds to limit and restrain its exercise. So far as was deemed necessary to prevent oppressive and unjust legislation, and only to the extent of these limitations, has the legislative power thus granted been circumscribed, and beyond these limitations, the power exists in its full vigor. Hence the necessity, whenever it is alleged that the Legislature has transcended its powers, to point out some restriction or limitation, which has been disregarded. It is not pretended that there is any express provision in the Constitution, inhibiting the Legislature, from passing any law which shall impose a burthen upon some members of the community, which shall be devoted to the benefit of other members. There is nothing to be found in the Constitution which can be held to inhibit the Legislature from imposing burthens, or raising money from citizens of the state, which is not for the direct benefit of the state, and is never designed to belong to the state. To deprive the Legislature of this power, would to a great extent destroy its usefulness—while it would to a certain extent, deprive it of the power of abuse, it would destroy its power to regulate by law a thousand things, which the public good requires should be regulated by law. It is astonishing how fertile the modern mind is in theorizing, too often without reflecting where these happy

theories would lead us. Let us once hold that the Legislature could not compel any citizen to submit to a burthen, except for the benefit of the state, aggregate, or for some subdivision of it, as a county, city, or town, or to pay any money except it shall go into the state or some subordinate public treasury, and we should soon find ourselves on the brink of anarchy itself—we should tie up the hands of the Legislature it is true, so that they might not do some evils which they have hitherto had the power of doing; but we should also let loose upon society ten thousand evils, which in every well regulated community it has always been the duty of the Legislature to suppress. It is in the exercise of this indispensable power, that ferries, toll-bridges and the like are licensed or chartered. * * *

It is the power which the Legislature possesses, of imposing burthens upon certain members of the community who are supposed to be benefited, by the efforts or acts of certain other members of the community, as a reward or compensation for such acts. This power is only exercised by prudent and judicious legislators, where it is supposed that the public have a general interest in the acts thus encouraged, and the individuals or classes upon whom the burthen is imposed, have a particular interest in the performance of the acts. It would fill a volume to enumerate all of the familiar instances of the exercise of this power—a power which must be exercised constantly in every civilized community, or the well being of that community must vitally suffer. This power may no doubt be abused, by an unjust and oppressive exercise of it. There are some whose minds are constantly exercised by harrowing apprehensions of terrible calamities to befall individuals and states, by an abuse of the powers, with which public officers are entrusted, and to avoid such dangers, would deprive the Legislature of all power to do mischief, without remembering that at the same time they deprive them of power to do good. A large discretion must necessarily be left with the Legislature for the proper and judicious exercise of which, there can be no accountability but to those who elect them. In this case we are far from the opinion that there has been any abuse of the exercise of that discretion. The Legislature incorporated this charity, which was deemed worthy of some sort of an endowment. It might have been endowed from the

public treasury, and a fund for that purpose, provided by any legitimate mode of raising a revenue. * * *

"With the view we take of this case, it is immaterial, whether this be considered a public or a private charity. But it should more properly be considered a public charity. As such, the Legislature had a right to consider it, as much as the institution for the blind. It might have conferred upon it, the right to take and condemn private property for a site for the building, as well as to confer upon a railroad company the right to take private property for a road way."

We, therefore, beg to advise you that the act of the General Assembly in enacting the law to create a police pension fund in cities of over two hundred thousand inhabitants is a valid exercise of the legislative power of the assembly; that it is a separate, distinct and independent act by itself, and does not in any manner amend the revenue act or any of its sections.

The enactment of this character of legislation by the General Assembly is not prohibited by the Constitution, and in a similar case, viz., *Hughes v. Traeger*, 264 Ill. 612, presented to the Supreme Court of this state in regard to the validity of the Municipal Pension Act, the Supreme Court stated that legislation of this character was within the constitutional power of the General Assembly.

In the case of *Lyons v. The Police Pension Board of Chicago*, 255 Ill. 139, in which the constitutionality of the Police Pension Fund Act was involved, the act then before the Supreme Court had the same title as this act has. The Supreme Court there said that the title authorized the creation of a police pension fund for the payment of pensions to members of the police department, and Section 9 of the act of 1915 provides how the said fund shall be raised, and without Section 9 of the act of 1915 no provision would be contained in the act permitting the Board of Trustees to raise a fund for the payment of pensions.

From a consideration of the entire act, including its title, we beg to advise you that the General Assembly sought by said Pension Fund Act to create a fund for the pur-

pose of pensioning retired police officers and widows and children of deceased officers, that the said act is a valid exercise of the legislative functions of the General Assembly, and that the enactment of said act by the General Assembly does not in any form violate any of the provisions of the Constitution.

Respectfully submitted,

JAMES W. BREEN,
Assistant Corporation Counsel.

Approved:

CHARLES M. HAFT,
Acting Corporation Counsel.

Zones of Quiet in Neighborhood of Schools.

November 5, 1915.

HON. JOHN SIMAN, City Clerk.

Dear Sir:

Your communication of October 27, 1915, to the corporation counsel, requesting an opinion as to the legality of a proposed ordinance creating and establishing "a zone of quiet in all territory embraced within a distance of two blocks of every building used, controlled, leased, or operated for free common school education in the City of Chicago," has been referred to me for reply.

It is a general rule of construction in this state that an act general in its terms and uniform in its operation upon all persons and subject-matter in like situations is general, and not obnoxious to the objection that it is local or special legislation.

West Chicago Park Commissioners v. McMullen, 134 Ill. 170.

In the case of *Bailey v. The People*, 190 Ill. 28, the court, on page 33, quotes with approval from the case of *Booth v. People*, 186 Ill. 43 (p. 48), as follows:

"The state inherently possesses, and the General Assembly may lawfully exercise, such power of restraint

upon private rights as may be found to be necessary and appropriate to promote the health, comfort, safety and welfare of society. This power is known as the police power of the state. In the exercise of this power the General Assembly may, by valid enactments—i. e., “due process of law”—prohibit all things hurtful to the comfort, safety and welfare of society, even though the prohibition invade the right of liberty or property of an individual.’ ”

The police power of the city or state embraces the protection of the lives, health and property of citizens, the maintenance of good order and the preservation of good morals.

Patterson v. Kentucky, 97 U. S. 501.

It may be said to be that inherent and plenary power in the city or state which enables it to prohibit all things hurtful to the comfort, safety and welfare of society.

Town of Lake View v. Rosehill Cemetery Co., 70 Ill. 191.

Meadowcroft v. People, 163 Ill. 56.

Booth v. People, 186 Ill. 43.

All rights, whether to things tangible or intangible, are subject to the police power of the state.

Northwestern Fertilizing Co. v. Hyde Park, 70 Ill. 634.

Hawthorn v. People, 109 Ill. 302.

In the case of *People ex rel. v. Walsh*, 96 Ill. 232 (p. 250), and also in the case of *Cicero Lumber Co. v. Town of Cicero*, 176 Ill. 9 (p. 24), our Supreme Court referred with approval to, and made the following quotation from the case of *People v. Kerr*, 27 N. Y. 188:

“ ‘So far as the existing public rights in these streets are concerned, such as the right of passage and travel over them as common highways, a little reflection will show that the Legislature has supreme control over them. When no private interests are involved or invaded, the Legislature may close a highway and relinquish altogether its use by the public,

or it may regulate such use or restrict it to peculiar vehicles, or to the use of particular motive power. It may change one kind of use into another, so long as the property continues devoted to public use. What belongs to the public may be controlled and disposed of in any way which the public agent sees fit.' ”

Among the powers conferred upon cities by the General Assembly, under Section 1 of Article V of the Cities and Villages Act, are the following:

“Seventh. To lay out * * * pave or otherwise improve streets * * *.

“Ninth. To regulate the use of the same.

“Fourteenth. To regulate the use of sidewalks * * *.

“Twentieth. To regulate traffic and sales upon the streets, sidewalks and public places.

“Sixty-sixth. To regulate the police of the city or village, and pass and enforce all necessary police ordinances.

“Seventy-fifth. To declare what shall be a nuisance and to abate the same; and to impose fines upon parties who may create, continue or suffer nuisances to exist.

“Seventy-eighth. To do all acts, make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease.

“Ninety-seventh. To pass all ordinances, rules, and make all regulations, proper or necessary, to carry into effect the powers granted to cities or villages, with such fines or penalties as the City Council * * * shall deem proper: Provided, no fine or penalty shall exceed \$200, and no imprisonment shall exceed six months for one offense.”

The proposed ordinance would manifestly be one in the interest of the public health, comfort and welfare, having a plain and substantial relation thereto, and its provisions would tend to promote and preserve the health, comfort and welfare of the inhabitants of the city by relieving employes, scholars or pupils in our public schools, and residents in the immediate vicinity of such schools from the distracting and damaging effects resulting from unnecessary noises and disturbances.

Municipalities are allowed a greater degree of liberty in the matter of legislation in the interest of public health than any other. In the case of *Gundling v. City of Chicago*, 176 Ill. 340, our Supreme Court, referring to paragraphs 66 and 78 of the Cities & Villages Act hereinabove quoted said:

“Paragraph 66 before quoted expressly authorizes the adoption of ordinances necessary to police power, and Paragraph 78 is an express authorization of the City Council to make all regulations necessary or expedient for the promotion of health or the suppression of disease. Under these two provisions express authority is granted the municipality to pass all ordinances or requirements tending to promote the public health, morals, security, comfort and welfare of the community. Such legislation is included within the provision authorizing the enactment of police regulations. The most important of police powers is that of caring for the health of the community, and that is inherent in a municipality, and may be exercised whether expressly granted or not, because the preservation of the health of the public is indispensable to the existence of the municipal corporation.”

In the case of *Love v. Judge of Recorders Court*, 128 Mich. 545, where the ordinance forbade the *making of any public address in any public place* within one-half mile of the City Hall, without a permit from the mayor, the court pointed out that the city had the right to forbid the use of public places for this purpose entirely, and having the power so to do, it of necessity had the power to permit it in its discretion, and on what it deemed proper occasions.

We are of the opinion that the City Council has ample power and authority, under the powers delegated to cities and villages by the Cities and Villages Act, *supra*, to establish the contemplated zone of quiet within a reasonable distance surrounding all free public schools within the city, and that such action on its part can be fully sustained as a lawful exercise of the police power of the city.

Very truly yours,

ROY S. GASKILL,

Approved: Assistant Corporation Counsel.

CHARLES M. HAFT,

Acting Corporation Counsel.

Renewals of Licenses for Slaughtering and Rendering Plants.

November 6, 1915.

HON. JOHN SIMAN, City Clerk.

Dear Sir:

We are in receipt of your letter of October 22nd, in which you ask to be informed as to whether, under Section 1329 of The Chicago Code of 1911, it is necessary for you to send notices annually to aldermen in the matter of renewal of licenses for slaughtering, rendering, etc.

Section 1329 of the code provides in part as follows:

“1329. LICENSE FEES—CITY CLERK TO NOTIFY ALDERMEN—REVOCATION OF LICENSE.) The applicant or applicants for such license shall before the issuance of the same pay to the city collector as an *annual license fee* the sum of three hundred dollars to conduct the business of rendering, packing meat for shipment, slaughtering
* * *

Said section provides further:

“Provided, however, that thirty days before any such license is issued there shall be mailed by the city clerk a notice of such application to the aldermen representing the ward in which the applicant is *carrying on such business, or is about to carry on the same*, and to the aldermen whose wards or any part thereof are within a radius of three miles of the present or proposed location where application is made to carry on such business.”

The italicized portion of this section, viz: “is carrying on such business, or is about to carry on the same,” clearly brings within its scope all applications for licenses, whether for the continuing of a present licensed business or for the licensing of a new one.

Section 1516 of The Chicago Code of 1911 covers the period for which all licenses are issued. Said section provides as follows:

“No license shall be granted for a less period nor for a longer period than one year, except where otherwise specifically provided, and every license shall ex-

pire on the thirty-first day of December following the date of its issuance, except where otherwise specifically provided."

It will thus appear from this section that licenses must be issued for a fixed period, with the express provision that no license shall be issued to extend beyond a certain date, which means that at the expiration of a period of time for which a license is granted the license expires and the licensee desiring to continue his business must thereupon obtain a new license therefor.

We are of the opinion that for the reasons hereinbefore set forth it is necessary for you to send notices annually in the matter of renewal of licenses for slaughtering, rendering, etc.

Yours very truly,
 GEORGE A. CURRAN,
Assistant Corporation Counsel.

Approved:

CHARLES M. HAFT,
First Assistant Corporation Counsel.

**Rights of C. & N. W. Ry. Co., in North Water Street East
 of Wells Street.**

November 6, 1915.

HON. JOHN KJELLANDER, Chairman, Sub-Committee of Committee on Streets and Alleys.

Dear Sir:

Your sub-committee requested an opinion in regard to the rights of the Chicago & Northwestern Railway Company in North Water street and in the streets formerly occupied by their terminal north of the river.

We find that, so far as the rights of that company west of Wells street are concerned, the matter has been fully covered by an opinion written in the law department by Messrs. Michels and Arkin under date of June 30, 1913. The same appears in the Volume of "Opinions of the Corpora-

tion Counsel and Assistants from January 1, 1913 to October 5, 1914," at page 315. The conclusion reached by the law department is that the passage of the ordinance of January 26, 1880, conferred upon the railroad company no property rights that are beyond the power of the city to reclaim at the present time.

A different question is presented with reference to the vacation of the street not named but described in Section 19 of the Track Elevation Ordinance passed on February 11, 1901, but that question has probably been considered by your committee heretofore and need not be gone into at the present time. So far as the vacation of the part of Franklin street which lies between the south line of North Water street and the river is concerned, this was effected by an ordinance passed on September 23, 1901 (see Printed Journal, page 748), and was in the usual form of a vacation ordinance, the sum of \$25,000 being named in said ordinance as the compensation for same. There is a proviso in that ordinance by which the City of Chicago reserves the right to construct and maintain tunnels under Franklin street.

As to the rights of the city east of Wells street, we find that the same are covered by two grants. The first was included in an ordinance concerning the Galena & Chicago Union Railroad passed July 17, 1848. (Spec. Ordinances of Chgo., p. 704.) Section 3 of said ordinance reads as follows:

"TRACK ON NORTH WATER STREET, ETC.) Section 3. Said company may lay down, maintain, use and occupy a single or double railroad track, with suitable turn-outs and turn tables, on the most suitable route from Kinzie street, at or near the north branch of the Chicago river, to the proposed new street, or proposed new location of North Water street, proposed to be established about where the alley between Kinzie and North Water streets now is, and may extend the same along said proposed new street when laid out to Wolcott street; or if said new street shall be extended through block two in Kinzie's addition to North Water street, may extend said single or double track, if they shall elect to do so, on said new street when extended to North Water street, and thence along North Water

street part of the way, or all of the way, to the east limits of the city; or said company may occupy the alley through block two in Kinzie's addition, from Wolcott to Kinzie street, with their railroad track as aforesaid, and extend it thence along Kinzie street to North Water street, and thence across or along said North Water street all of the way or part of the way to the east limits of the city as aforesaid: Provided, however, that the said railroad track or tracks shall be located in said streets in such manner as the Common Council may hereafter direct."

It would seem, from the information at hand, which will have to be verified before we are entirely satisfied with it, that what is at present known as North Water street is the new location for same, mentioned in said section. Consequently, this grant seems to be for a single or double railroad track with suitable turnouts and turn tables to the eastern limits of the city as they existed at that time. This would include rights east of State street as well as the rights which they have between Wells street and State street.

The second grant relating to this matter is contained in an ordinance approving a contract with the Galena & Chicago Union Railroad Company passed July 11, 1864 (Spec. Ordinances of Chgo., p. 706). This ordinance provided for the construction of a viaduct, extending from the north side of North Water street to the bridge over State street. The contract authorized by said ordinance is set out in full therein and contains the following paragraph:

"And the said party of the second part further stipulates and agrees, that the said railroad company shall at all times hereafter have the right, uninterruptedly, to stand, move or propel its locomotives and cars along North Water street and across Wolcott street, beneath the said proposed viaduct, any past, present or future ordinance of said city to the contrary notwithstanding: Provided, however, that no locomotive when in active service, shall stop or stand directly under the said viaduct, and further, that so much of (new) North Water street at this point shall be left open and unobstructed as to allow always a free passage for teams through and along the same."

Our conclusion, therefore, is that the railroad company has the right to operate a single or double railroad track with suitable turnouts and turn tables on North Water street from Wells street east, to the boundary line of the city in the year 1848. We have asked the superintendent of the Bureau of Maps to secure us some information in regard to this boundary line and will present same to your committee as soon as it is received. The oldest map that we have been able to secure up to the present time is one made in 1867 and shows the shore line about Seneca street.

Our attention has been called to the fact that the construction of the proposed viaduct will materially modify the work in connection with the Union Station authorized by the ordinances relating to same and the amendments thereto. From statements made by the engineers, it would seem that the cost to the Union Station promoters will be considerably less, at least \$150,000. It is important, therefore, that the matter be taken up in connection with that project in order that some understanding may be arrived at so as to secure the benefit of this change in plans for the city.

We also beg to call your attention to the fact that there is a report now being prepared in this department concerning damages that will be caused by the proposed viaduct and approaches. Mr. P. W. Sullivan of this department has the matter under consideration and he has had numerous conferences with experts. We are informed that his report is being hurried as rapidly as possible, but that it will not be ready for at least two weeks.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

CHARLES M. HAFT,
Acting Corporation Counsel.

Qualifications of Members of Board of Education.

November 8, 1915.

TO THE HONORABLE, THE CITY COUNCIL
OF THE CITY OF CHICAGO.

Gentlemen:

In response to your request for an opinion as to the eligibility of Mr. A. Sheldon Clark and Rev. J. P. Brushingham as members of the Board of Education, we submit the following:

The eligibility of these two persons, whose names were submitted to you by the mayor as appointees to said board has been questioned on account of the statutory provision relating to the qualifications of members of that body. This provision reads as follows:

“Sec. 129. Any person having resided in any such city more than five years next preceding his appointment shall be eligible to membership of such Board of Education.”

There are two points involved, first, whether these parties resided in the city more than five years next preceding their appointment within the meaning of the statute, and, second, whether the section of the statute above quoted is constitutional.

We have made a careful study of the law and an investigation of the facts and have come to the conclusion that both of these gentlemen can qualify as residents of the city even if the provision of the statute is valid, but that the statute conflicts with the provisions of the Constitution and could not be held to preclude their appointment if they can qualify under the terms of the constitutional requirements as to citizenship and residence.

The writer has ascertained the following facts in regard to Mr. Clark:

Mr. Clark is and has been for many years a permanent resident of the City of Chicago. He and the other members of his family made their summer home in Evanston. They

went there this spring and the family has not yet returned, but intend to do so. Mr. Clark himself, however, maintained a residence during all the time that his family was in Evanston at the Hotel Plaza, within this city.

The removal of his family to Evanston did not in any sense of the word constitute a change of residence within the meaning of that word as applied to the present situation. This would be the case even if he had himself remained there and had not maintained a place of abode within the city, provided he had gone there with no intention of establishing a permanent residence there.

It has been held in a large number of cases in this state, and it is recognized as settled law, that residence is primarily a matter of intention. An absence for months or even years from a party's legal residence, if during that time he intended it for a mere temporary purpose, and it was followed by a resumption of his former residence, will not be abandonment of the residence within the meaning of either the election laws or for any other purpose.

See cases in 3 Ill. Cyc. Dig., p. 777.

Moffett v. Hill, 131 Ill. 239.

Carter v. Putnam, 141 Ill. 133.

Pells v. Snell, 130 Ill. 379.

Behrensmeyer v. Kreitz, 135 Ill. 591-624.

In the light of the above facts and the unquestioned state of the law, no doubt whatever exists as to Mr. Clark's eligibility.

In the case of Dr. Brushingham, the question of residence is more complicated, although in its last analysis not more difficult. He is a minister of the Methodist Church, and by reason of his profession he is subject to transfer from one locality to another. That he may, in case he desires to do so, settle down and regard the place where he is assigned temporarily as his permanent home for all purposes is undoubted. It has been so specifically recognized by the courts of this state and by the leading text writers, but the very fact that this right was recognized and accorded him by the Supreme Court in the language quoted below, gives rise to the neces-

sary inference that he would have the right to look upon such sojourn with a new congregation as merely a temporary residence.

The Supreme Court of this state in *Kreitz v. Behrensmeyer*, 125 Ill. 193, adopted the following text from McCrary on Elections, Second Ed., page 489:

“A man may acquire a domicile if he be personally present in a place and elect that as his home, even if he never designs to remain there always, but designs at the end of some short time to remove and acquire another. A clergyman of the Methodist Church, who is settled for two years, may surely make his home for two years with his flock, although he means at the end of that period to remove and gain another.”

The facts in regard to his residence are as follows:

He began his professional work in Chicago at the Fulton Street M. E. Church in the year 1883, remaining there three years. After that he was pastor of the Ada street church five years, the Fulton street church again four years, the First M. E. Church at Clark and Washington streets nine years, and then became district superintendent in Ravenswood, where he remained until 1909. He belongs to the Rock River Conference, which includes Chicago and which requires of him that he accept such charges and go to such places as he may be sent to. He was sent to Sycamore, Illinois, a town about fifty miles away from the city on the C. & N. W. Ry., in 1909, for one year. He resided there at a furnished parsonage, intending to return at the end of the year to Chicago, where one member of his family and most of his household furniture remained. His absence was more extended than he had anticipated, and he was gone altogether three years before he returned in 1912 to assume the pastorate of the South Park M. E. Church. During his entire absence he retained his membership in regular standing in the organizations to which he belonged here, participating in other ways in the social, religious and public affairs of the city by visits so frequent as to amount almost to regular weekly trips, and always regarded the city as his home and intended to return as soon as he was relieved of his charge at Sycamore.

Dr. Brushingham voted at Sycamore, and unquestionably under the authority of *Welsh v. Shumway*, 232 Ill. 54, and a number of other cases, it must be said that for purposes of exercising his right of suffrage, a person is disqualified from voting at his permanent place of abode if he has voted elsewhere. But this does not necessarily apply on a question relating to his qualifications to hold a position. In fact, the rule is that, for all other purposes except that of voting, the mere fact that he voted at another place is only a circumstance to be taken into account in determining his residence but does not establish conclusively a residence in such place. Even on the question of the right to vote the court said, in *City of Beardstown v. City of Virginia*, 81 Ill. 546, that the residence of a voter is a question "which often it is quite difficult to determine, and may be found either way without doing any marked violence to principle or the facts."

All of the authorities above cited hold that the mere fact that a person voted elsewhere, while it is often taken as an indication of the intention of a party to remain permanently in a place of abode, is not conclusive.

"So, also the fact of a person voting in a particular election district, he knowing his home is elsewhere, would not make him a permanent resident of such district."

Moffett v. Hill, 131 Ill. 240-5.

When we get away from the question of the right to vote at a given election, this view is strengthened materially by numerous decisions of the courts that might be quoted.

In the case of *Hayes v. Hayes, et al.*, 74 Ill. 312, it was claimed that Dr. Hayes, concerning whose estate there was litigation, was a resident of the State of Iowa, he having voted there a number of times. This case is strictly in point, since it related to the residence of a clergyman. The court held, that, notwithstanding his voting in the State of Iowa, his permanent residence was at Rock Island, Illinois. It was decided that he had left Rock Island on account of a disagreement with his wife, and that in case she had gone with him to Iowa he might have contemplated a permanent residence

there, but the circumstances show that in spite of his voting in the State of Iowa, he did not look upon it as his permanent residence. The court says, among other things:

“There is a strong current running through all the mass of testimony tending to show it was never the intention of Dr. Hayes to make Iowa his home. It is inferable he would have done so had his wife joined him there and been pleased with the place and prospects. All his letters, and much of the testimony, go to show Iowa was not regarded by him as his home. Nothing can be inferred from the fact of his having voted there; that act was consistent with his domicile in this state, the law of Iowa giving the right to a resident of six months. He was such resident, undoubtedly, and as such had a right to vote. This could, by no possibility, effect a change of domicile. To effect a change of domicile there must be an actual abandonment of the first domicile, coupled with an intention not to return to it, and there must be a new domicile acquired by actual residence within another jurisdiction, coupled with the intention of making the last acquired residence a permanent home. Nothing of this is discernible in the testimony in this record. The case of *Smith v. The People*, 44 Ill. 16, may be referred to in support of this doctrine and other cases cited. *Smith et al. v. Croom et al.*, 7 Fla. 200; *Shaw v. Shaw*, 98 Mass. 158. But the doctrine does not need the citation of authorities in its support.”

Another case that might be cited on this proposition is *O’Hair v. Wilson*, 124 Ill. 351, where a person was in the State of Indiana and voted at an election there, but it was nevertheless held that he had a legal residence in this state.

Perhaps the strongest case along this line is the recent case of *Holt v. Hendee*, 248 Ill. 288, where it was held that even though a person was adjudicated by a court of another state to be a resident there and could qualify as an administrator of an estate by reason of such residence, this was not *res adjudicata* of the question of such person’s actual domicile so as to preclude the taxing authorities of the state from taxing his personal property in the State of Illinois.

We are of the opinion, therefore, that Dr. Brushingham’s temporary absence from the city can not be regarded as disqualifying him under the terms of the statute even

if it is to be regarded as valid. His having voted at Sycamore would have disqualified him from voting in Chicago for a period of ninety days thereafter, but as a member of the Board of Education is not necessarily a voter it would not have disqualified him for that position even for that limited period.

Turning now to the question of the constitutionality of the provision of the statute quoted above, we find that in the recent case of *People v. McCormick*, 261 Ill. 413, the court decided that the five year qualification fixed in the statute for members of the Board of County Commissioners of Cook County was unconstitutional. The reasoning applied by the court in that case bears very strongly on the question presented in this instance. It was held that Section 6 of Art. VII of the Constitution of Illinois fixed the qualifications for members of the Board of County Commissioners in Cook County. Section 6 reads as follows:

“No person shall be elected or appointed to any office in this state, civil or military, who is not a citizen of the United States, and who shall not have resided in this state one year next preceeding the election or appointment.”

The court in that case held:

“All persons are equally eligible to office who are not excluded by some constitutional or legal disqualification. Eligibility does not even depend upon the right of suffrage, for persons not electors may be appointed or elected to various offices. For instance, a woman may be elected county superintendent of schools or appointed master in chancery or notary public. It is the right of the people to elect any eligible person to an office, and it is the duty of the person chosen to qualify and perform the duties of the office. (*People v. Williams*, 145 Ill. 573.) Where the constitution declares the qualifications for office it is not within the power of the Legislature to change or add to them unless the constitution gives that power. ‘It would seem but fair reasoning, upon the plainest principles of interpretation, that when the constitution established certain qualifications as necessary for office it meant to exclude all others as prerequisites. From the very nature of such a pro-

vision the affirmance of these qualifications would seem to imply a negative of all others. * * * A power to add new qualifications is certainly equivalent to the power to vary them.' (1 Story on the Constitution, Sec. 625.)"

People v. McCormick, 261 Ill. 413.

The constitution provides for a system of free schools, and speaks of state, county, township and district school officers. It also specifically mentions the Board of Education in the amendment relating to the City of Chicago, adopted by the people in 1904, prior to the passage of the present School Act. It therefore recognizes, in precise terms, the Board of Education of the City of Chicago as the body having in charge the system of free schools in the City of Chicago. It would be a jugglery of words to say that the "Board of Commissioners" provided for the County of Cook stands in a different position before the law as to the status of its members as constitutional officers than does the "Board of Education" provided for the City of Chicago.

It cannot even be said that the opinion in the McCormick case applied only to official positions originally created by the constitution, for that view is hardly tenable in the face of the fact that the position of President of the Board of County Commissioners is not named in the constitution and is expressly created by statute. The right of Mr. McCormick to both positions was assailed, but the court made no distinction between them. The necessary inference is that, while the position of president of the board is not created by the constitution it has its origin in a provision of the constitution and therefore comes within the terms of the constitutional qualification.

Section 4 of Article VIII states that no "teacher, state, county, township or district school officer" shall be interested in the sale, proceeds or profits of books, etc. This provision is manifestly intended to cover members of the Board of Education of the City of Chicago. The Supreme Court in *People v. Healy*, 231 Ill. 629, pointed out that this board is "a state agency and connected with and a part of the

free school system of the state." Hence, the members of the board are not only among the school officers designated in the constitution, but they come under express provisions of the constitution as state officers and are recognized by the courts as state officers, and they must be regarded as constitutional officers.

The court in the McCormick case, in citing other cases in support of its view, spoke of the power of the Legislature as to offices created by statute, and referred to the Loeffler case, 175 Ill. 585, and the Olson case, 245 Ill. 288, as cases wherein it was held that in statutory offices the length of term and mode of appointment may be altered at pleasure and the office may be abolished altogether.

It is worthy of note that in the first of these cases the office under consideration was that of civil service commissioner, which was not mentioned in the constitution at all, and the court so holds all the way through, while in the second case the court states its position on the matter so that it really construes judges of the Municipal Court as constitutional officers, although not particularly mentioned in the constitution even in the amendment where the Legislature is authorized to create Municipal Courts in the City of Chicago. It undoubtedly does this on the theory that the mere naming of the court constitutes the position as one created by the provisions of the constitution. A close reading of the two cases shows the distinction between the two classes of officers clearly.

Aside from this point, the fact that military officers are mentioned, along with others, in the section of the constitution concerning qualifications, while no military office is named in the constitution, tends strongly to show that the purpose of the section is to have it apply to all offices which originate from provisions of the constitution. The words of the court "provided for by the constitution," as used in the McCormick opinion, can be applied with full force to members of the Board of Education as well as to members of the Board of County Commissioners and to the president of the Board of County Commissioners.

Again, the Supreme Court in the McCormick case expressly states that the language of the constitutional section in question must be considered sufficiently comprehensive to include "city and other municipal officers," and it will be noted that no city or municipal officers are created by the constitution by name. Consequently, to say that the court intended that the decision should not apply to the members of a board actually named in the constitution is stretching the language to an unwarranted length.

We find also that the courts do not favor legislative restrictions on the right to hold office, and this point could be elaborated more fully, so as to lead finally to the principle that no one who is declared eligible by the constitution for holding an office in the state that is provided for in any form by or originates from the constitution can be barred from holding same.

The section of the School Act prescribing the qualifications of the members of the Board of Education must be held unconstitutional for another reason. It undertakes to permit persons who are not qualified under the constitution to hold the office. This, in the light of the fact that the position is a constitutional office and has been held to be a state office by the courts, is clearly beyond the authority of the Legislature.

The act says that "any person" who has resided in the city the requisite length of time shall be eligible. This would permit others than citizens to be appointed, for the words "any person," used in the constitution or in statutes, have always been construed as including aliens.

(See authorities collected under head of "Any Person" Vol. I, Words and Phrases, p. 427 *et seq.* and Vol. I, second series of same, p. 227 *et seq.*)

We do not deem it necessary to pursue the subject along this line any further, since it is an elementary principle of law that a statute which would have the effect of rendering a person eligible for a position from which he is barred by the constitution cannot stand.

For the reasons set forth above we are convinced that

the persons named are eligible for the positions on the Board of Education to which they have been named.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

CHARLES M. HAFT,
First Assistant Corporation Counsel.

**Ordinance Creating Committee on Standards and
Apportionment.**

November 8, 1915.

HON. WM. HALE THOMPSON, Mayor.

Dear Sir:

Your request for an opinion as to the validity of an ordinance creating a Committee on Standards and Apportionment voted on at the meeting of November 1, 1915 (Printed Journal, pp. 1980-1), was referred to the undersigned for consideration.

We are of the opinion that the said ordinance was not passed in accordance with the rules of the City Council and is invalid for the further reasons given below.

It is proposed by said ordinance to create a new standing committee to be known as the Committee on Standards and Apportionment. By the rules of the City Council adopted on April 26, 1915, as subsequently amended, it is provided that certain committees therein named "shall be the standing committees." The said ordinance provides for an additional standing committee.

There is no legal objection to creating a standing committee by ordinance, but, since the creation of same in the face of the provision mentioned above is in conflict with and in effect an amendment to or a suspension of the rules, it follows that it must be passed by a two-thirds vote, since a two-thirds vote is required to suspend such rules. The vote on the ordinance was 43 to 27. Therefore the rules were not complied with.

The statute provides that the City Council may determine its own rules of procedure. When such rules are adopted they must be followed.

Chicago Telephone Co. v. Northwestern Telephone Co., 199 Ill. 324, affirming 100 Ill. App. 57.

City of Carbondale v. Wade, 106 Ill. App. 654.

The mere fact that in this instance the conflicting provision is in the shape of an ordinance does not overcome this objection. It is quite plain that the rules of the City Council would amount to nothing as a code of procedure if they could at any time be set at naught by a majority vote by simply putting the measure in conflict with same in the form of an ordinance.

The first section of the proposed ordinance creates a standing committee and says how it shall be constituted. If the ordinance is regularly enacted, that section would be valid, aside from the question of the manner of the committee's selection.

The second section makes it the duty of the new committee to prepare and transmit to the Committee on Finance a draft for the annual appropriation bill and in other ways to exercise supervision over appropriation matters. If this is to be so construed that the new committee merely acts in an advisory capacity to the Committee on Finance there can be no legal objection to same, but if it is intended thereby to take away the powers of the comptroller, as provided by statute (Art. VII, Sec. 17, Cities and Villages Act), that would be beyond the authority of the City Council. The statute requires the comptroller to submit to the City Council a report of his estimates of moneys necessary to defray the expenses of the corporation for the fiscal year and particularly points out what the report shall contain. Among other things he is given power to require all officers to give him statements of the condition and expenses of their respective offices or departments. The report is to include such other information as he may deem necessary "to the end that the City Council may fully understand the money exigencies and demands upon the corporation for the current year."

In view of these provisions of the statute, any appropriation bill to be drafted must take into account the estimates of the comptroller. Otherwise there would be grave danger of the appropriation bill being held invalid. It is to be presumed that the requirements of the statute are put there for a purpose and that they will be lived up to in letter and in spirit. The City Council has ample power to modify the estimates of the comptroller, but to ignore his estimates and place the powers which he possesses in this respect into the hands of a committee of the City Council is clearly beyond the law, to say nothing of the duplication of work that it would entail.

It may be said that we have no right to assume that the committee will exercise powers in an unlawful way, and we do not undertake at this time to say that it is the intention of the council to have the committee do anything that it has not a right to do. But, on the other hand, there is nothing which the new standing committee can do legally that a sub-committee appointed by the Committee on Finance cannot now do legally, without the passage of this ordinance. Hence, unless it is the intention to extend the powers of such a committee why should the ordinance be enacted?

The third section of the proposed ordinance is subject to the most serious legal objections.

It first provides for investigations by the new committee without fixing any limitations to same.

There is nothing in the law which prohibits members of the City Council from making investigations individually or collectively on their own responsibility and unofficially, but to grant power to investigate generally as a council committee and to compel all city officers and employes to appear before it at any time upon request constitutes such a committee an executive rather than a legislative body. In some degree this authority conflicts with the powers vested by law in the Civil Service Commission, and would undoubtedly lead also to duplication of work, as in the case of the making of the estimates as above pointed out. But the more serious objection on this ground is set forth below.

The power delegated to "prescribe such standards and specifications necessary to secure economy and efficiency" is a power than can be exercised by the City Council itself only by ordinance, and such power obviously cannot be delegated to a committee.

Those officers of the city who hold their positions by virtue of statutory authority could not be compelled to submit to the orders of such a committee.

Scribner v. Chase, 27 Ill. App. 36.

It would perhaps be possible, by the passage of proper ordinances to require persons holding offices created by the action of the council to comply with the directions of such a committee in regard to investigations when specially ordered by the council, but it is at least doubtful whether they could be required to produce public records and documents in those cases where the custody of same is entrusted to them by express provisions of the statutes or ordinances.

In the case last cited, speaking of where the Board of County Commissioners undertook to exercise such a power, McAllister, J., used the following language:

"Now, can it be maintained that the law is so unreasonable as to charge a public officer with such duties and responsibilities, but deny to him the power, control and discretion, as to the subject-matter, necessary to his protection? The question is not new in the courts of this country. It has arisen and been decided in various courts of the highest respectability, against the claim set up here, in cases that cannot be distinguished from this case with regard to the reasons and principles governing their decision. (Citing cases.)

"The effect of the decree in this case is to divest the recorder of the power conferred upon him by the law, of exercising a reasonable discretion in the care, management and government of his office, and the preservation of original deeds, books and records, confided to his custody. The decree is, for that reason, unauthorized by law, and manifestly erroneous. (Citing cases.)

"The resolution of the Board of County Commissioners, embodied in the notice given by the recorder to complainants, and set out in our statement of the case, was, in our opinion, unauthorized and void. * * *"

Scribner v. Chase, 27 Ill. App. 42,

Council committees are limited by parliamentary usage to the consideration of such things as are referred to them by the whole body or by a committee which has control over them. The making of investigations such as are specifically prescribed for the purpose of enabling the Finance Committee to pass with intelligence upon the various matters of appropriation and expenditure may be entirely within the power of such a committee, but the ordinance manifestly is intended to go beyond that. The ordinance requires of every officer and employe of the city upon request to appear before such committee and to furnish information, contracts and documents which may be required by such committee. The City Council would have the right to direct any of its committees to make an investigation along a particular line, but to delegate its whole power of making investigations to a committee without specifying what investigations it shall make, and with powers to summon the city's officers and employes without limit, is a delegation of power that is clearly invalid.

The third section also provides that the said committee shall have power to inaugurate such changes and betterments as do not require council or legislative action. This clearly contemplates the taking over of executive functions by the legislative body of the corporation.

The inauguration of changes and betterments might be effected through the means of legislative action but through no other means at the command of the City Council.

Clause 71 of Section 1 of Article V of the Cities and Villages Act which contains the power that is invoked in order to direct the course of conduct of the executive officers of the city, clearly states that such control over the officers and their duties as are contemplated by the proposed ordinance must be exercised "by ordinance." Said clause reads as follows: "To provide *by ordinance* in regard to the relation between all the officers and employes of the corporation in respect to each other, the corporation and the people."

The executive officers of the city are charged with re-

sponsibilities and clothed with powers by law. Whether the duties imposed on them are statutory or are defined by ordinance they are supposed to look to these enactments as their guides. The executive branch of the city government is as distinct from the legislative as in the case of the state or nation.

“Although the powers of government fall into the distinct departments of the legislative, executive and judicial, a municipal government embraces all of them. There is the legislative department, which ordains what the local laws shall be; the executive, charged with the duty of seeing that they are executed; and the courts, in which they are construed, applied and enforced. * * *”

People v. Olson, 245 Ill. 293.

While the distinction is frequently lost sight of because the City Council is constantly in close touch with the executive officers and both are working to the same common end, nevertheless it exists and must be considered in connection with such a departure from the beaten path as is here contemplated.

We are convinced that the City Council by the proposed ordinance is undertaking to delegate powers to a committee which it does not itself possess.

We have before us the recommendations made by the Banker's Advisory Committee which has conferred with the mayor, the corporation counsel and the comptroller with a view to creating a bureau to be known as “The Organization and Investigating Division of the Comptroller's Office.” This bureau as proposed by this committee will undoubtedly result in great improvements, in the methods of accounting, auditing and estimating now employed if the recommendations are adopted by the council, but since this report has no bearing on the legal features of the ordinance now pending we have no occasion to point out wherein the recommendations in this report overcome the objections to the ordinance under consideration.

For the reasons given above we are convinced that the

proposed ordinance creating a Committee on Standards and Apportionment is invalid.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

RICHARD S. FOLSOM,
Corporation Counsel.

Status of Secretary of the Department of Police.

November 9, 1915.

HON. THOMAS J. LYNCH, Chairman, Committee on Schools,
Fire, Police & Civil Service, City of Chicago.

Dear Sir:

You referred to this department a proposed ordinance amending the Police Reorganization Ordinance, with the request to be informed whether it is possible to so amend the Police Reorganization Ordinance as to make the secretary of the Department of Police eligible to participate in the Police Pension Fund without transferring the supervision of the records of the Department of Police from the jurisdiction of the second deputy superintendent of police.

We are of the opinion that the designation of the secretary of the department as a policeman has nothing whatever to do with his assignment to the bureau under the supervision of the second deputy superintendent of police. The amendatory ordinance as drafted undertakes to transfer the secretary and all his records and duties from the second deputy to the first deputy. We do not see the occasion for doing this, if the only purpose is to bring him within the class that participates in the pension fund. The amendment of Section 1908, so that the secretary of the department is designated as a "policeman" is sufficient for that purpose. He may continue to do his duties as before.

The only question that will arise as to his right to participate in such fund will be whether he can qualify under

Section 7 of the Revised Police Pension Act, which reads as follows:

“§ 7. Wheresoever the word ‘policeman,’ as used in this act appears, the same shall be interpreted and construed to mean the following:

“Any person who has been appointed and sworn or designated by law as a policeman, prior to the taking effect of this act, and has served in a regularly constituted police department as a policeman, or police patrol driver and police operator and a member of the police force thereof, and contributed to the Police Pension Fund for such time as he has been in the services of such Police Department as a policeman, or police patrol driver and police operator. The intention being that all policemen, or police patrol drivers and police operators who have so contributed to the Police Pension Fund (their widows and children entitled thereto) shall be entitled to any of the benefits of any pension law in force and effect when this act, in cities within its terms, shall supersede an act entitled, ‘An Act to provide for the setting apart, formation and disbursement of a Police Pension Fund in cities, villages and incorporated towns.’ (Approved April 29, 1887, in force July 1, 1887, as subsequently amended.)”

We do not understand that you have called for an interpretation of the section above quoted. Therefore, we will not discuss the question of the eligibility of the secretary of the department so far as the statute is concerned.

We return herewith original document forwarded by the city clerk with the request for an opinion on the above point.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Traffic at Intersection of Boulevard and Street Occupied by Car Tracks.

November 9, 1915.

HON. HARRY B. MILLER, Prosecuting Attorney.

Dear Sir:

Replying to your inquiry, "Has traffic on the boulevard the right of way over ordinary intersecting streets and intersecting streets occupied by car tracks?" I beg to state that this question is a matter of regulation by the park boards and the City of Chicago.

The South Park Commissioners have passed an ordinance, coming under the "Rules of the Road," which reads as follows:

"Every person riding or driving any animal or vehicle shall immediately come to a full stop when any police officer by raising his hand gives the signal so to do." (Municipal Code of South Park Commissioners, 1907, page 26.)

I am informed that the "Rules of the Road" are practically uniform on the part of all of the park boards.

On the subject of the "Rules of the Road" The Chicago Code of 1911, provides as follows:

"2491. OBSTRUCTING CROSSINGS.) No vehicle shall stop, except in case of accident or other emergency, or when directed to stop by the police, in such a way as to obstruct any street crossing or within five feet of any such street crossing."

"2497. DUTY OF POLICE TO ENFORCE RULES OF THE ROAD.) It shall be the duty of members of the Department of Police to enforce the provisions of this article and to see that the rules herein laid down are strictly enforced, except in case of an emergency. In such case these rules may be waived and the discretion of the policeman or policemen on duty at the particular point where such emergency shall arise shall be exercised so as to prevent accident, a blockade, or any impeding of traffic."

That the jurisdiction of the park board over boule-

wards at street intersections is not exclusive is clearly defined in the language of the Supreme Court.

“The streets and boulevards must be regarded as intersecting streets, the former under the control of the city and the latter under the jurisdiction of the park commissioners. By the statute the most comprehensive powers are given to the city over the streets within its domain, and by the Park Act the same power and authority over the boulevards are vested in the park commissioners. Each corporation is of equal power and dignity within the limits assigned to it by the law, and each has an equal right within the areas covered by these intersections, which belong to both in common. It would be the height of absurdity to say that at each intersection of a street with a boulevard the powers of either cease at the line of intersection and begin again when the intersection is passed. It was unquestionably the design of the Legislature that a boulevard, when laid out, should be a continuous driveway for pleasure and that the streets crossing it should be continuous highways. It could not be contemplated that either authority could cut off or close up the intersecting way without leave of the other. If the commissioners have the power to shut up these streets and compel the public to go around 250 feet north or 400 feet south over a new crossing, they have a right to shut them up absolutely. The principle is the same in either case, and the existence of such a power cannot be conceded. The jurisdiction, as we think, is concurrent, the commissioners having jurisdiction over the boulevard for all its uses and purposes, and the city having jurisdiction over the intersecting streets, subject to any limitations of use that may arise out of the park acts.”

Chicago City Railway Company v. South Park Commissioners, 257 Ill. 602 (612-613).

West Chicago Park Commissioners v. City of Chicago, 170 Ill. 618.

It is my opinion that no one has the right of way at intersections of boulevards or public highways, and where police officers are stationed their signal is the authority to cross. Where there are no police officers stationed, the traffic must be governed by the rules of common law that each one is expected to use the necessary care and caution at

street intersections, because of a personal liability which might result from negligence.

Yours very truly,

ANTON T. ZEMAN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Licenses for Public Automobiles.

November 9, 1915.

HON. CHARLES J. FORSBERG, City Collector.

Dear Sir:

In response to your verbal inquiry relative to an opinion given you by this department on November 2, 1915, with regard to the payment of a license fee by the owner of two or more automobiles, which he keeps in a licensed garage not his own, for the purpose of carrying or conveying passengers for hire or reward, and another opinion given to your predecessor in office on April 1, 1915, concerning which you state there is, to your mind, apparent inconsistency between the two, we call your attention to the provisions of Section 2663 of The Chicago Code of 1911, which excepts the persons who are not required to pay license fees. The excepted classes are:

“livery, boarding or sale stable keepers, or to garages as hereinafter defined in this chapter, nor to the owners of vehicles which shall stand or be kept upon any public cab or hack stand upon any street or public way in the city for soliciting or securing employment.”

You will notice that the person involved in the opinion of November 2d does not come within any one of these classes in that he is not himself running a licensed garage, nor is he a livery stable keeper, nor does he belong to any of the other classes in said section enumerated, and he, there-

fore, is subject to the provisions of said Section 2663 requiring him to pay a license fee on each car operated by him.

Yours truly,

CHARLES M. HAFT,
First Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Appropriations Affected by Decision in *Chadwick v. Sergel*.

November 10, 1915.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

Your letter of recent date in which you make a number of inquiries about certain phases of the question which has arisen concerning additional appropriations made by the City Council after the passage of the annual appropriation bill, was referred to the undersigned for consideration and reply.

We have received a copy of the opinion of the Supreme Court in the case of *Chadwick v. Sergel, City Treasurer*, which has just been decided. The court does not take up any other question except the validity of the appropriations made after the first quarter of the fiscal year.

Your first question is, whether appropriations made within the first quarter, but subsequent to the passage of the budget, are affected by this court decision. There are two sentences used by the court which might possibly be construed as meaning that no other appropriation can be made after the passage of the appropriation ordinance, even though the same is made in the first quarter of the fiscal year. The first sentence reads as follows:

“The council is required, during the first quarter of the fiscal year, to pass an appropriation ordinance appropriating such sum or sums as may be deemed necessary to defray all expenses and liabilities of the corpora-

tion, and no further appropriation shall be made at any other time within the fiscal year.”

The second sentence appears near the end of the opinion and is as follows:

“The statute, by language plain and unambiguous, limits the expenditure of corporate funds to the amounts appropriated during the first quarter of the fiscal year for the respective corporate purposes mentioned in the appropriation ordinance and prohibits any other appropriation being made at any other time within such fiscal year.”

The decision, it is true, does not take up this question in the precise form in which you ask it, and to that extent it may be said that the expressions of the court, to which we call attention, are *obiter dictum*. Nevertheless, the language does not warrant the inference that the court would hold other appropriations made during the first quarter of the year lawful, but such question is involved in grave doubt.

The case of *Kline v. Mayor, etc. of Streator*, 78 Ill. App. 42, sanctions the practice of making amendments to the appropriation bill during the first quarter of the fiscal year. The court uses the following language:

“Moreover, it was held in *King v. City of Chicago*, 111 Ill. 66, that the council is given until the last moment of the period named to pass the appropriation bill, and this being true it is difficult to state any good reason why the council, at any time within such period, could not amend an appropriation bill passed by it. In the case presented, the appropriation bill was amended within the period named by the statute in which it could be passed, and such amendment included the item for the bridge here in controversy. We are inclined to the opinion this action of the City Council was within the power conferred upon it by law.” (*Kline v. Mayor, etc.*, 78 Ill. App. 42.)

The above language of the Appellate Court appears reasonable and it may be sustained by the Supreme Court if the question is presented there, especially in view of the fact that the Supreme Court has several times upheld the validity of an appropriation ordinance passed at the last moment.

The case of *King v. City of Chicago*, 111 Ill. 66, cited by the Appellate Court, is strictly in point in regard to this. In that case the appropriation bill was passed so near the end of the time limited for same, that the mayor had no chance to veto any of the items before the close of the first fiscal quarter. Certain items were later vetoed by the mayor as being too large, and the City Council then passed the same at a reduced sum over the veto, the last action being taken after the first quarter of the fiscal year had passed. The court held that the right to pass the whole over the veto still existed, and therefore it had the power to pass the same in part.

Up to the present time we have always construed the two cases mentioned above as conclusive on the point that appropriations may be made during the first quarter of the fiscal year after the passage of the annual appropriation bill, and we still believe that the court, when the question is squarely presented, will rule that way, notwithstanding the two sentences from the Sergel decision, which we quote above.

Your next question is, whether the decision affects increases in salaries or wages made by the City Council subsequent to the passage of the budget. Our opinion with regard to this would depend in each instance on whether an appropriation was necessary to pay the increase in salaries and wages or not.

We would hold, in answer to the next question that you ask, that the City Council has the right to make transfers of items within a department or bureau so long as the same general purpose or object is subserved. Consequently, if the salary raise has been lawfully made and does not require an additional appropriation, the increase could be paid. We believe, however, that there are other difficulties in the way which prevent the raising of salaries after they have been fixed by the appropriation ordinance, and the Sergel decision does not affect these matters in any way.

Section 3 of Part Two of Article XII of the Cities and Villages Act provides that—

“The compensation of all officers shall be by salary, as fixed in the annual appropriation bill, by the City

Council, and the compensation of no officer shall be altered during the same fiscal year."

From decisions frequently rendered in cases relating to the Civil Service, we gather that the words "officers" and "officer" as used in the statute, would be construed as including employes. However, this is not material, because the City Council has itself acted in reference to this matter. It is provided by Section 1646 of The Chicago Code of 1911 that—

"The salaries or compensation of all officers, clerks and employes of the city, shall be determined and fixed by the City Council in the annual appropriation bill."

While the direct answer to your question therefore is, that the decision does not affect increases in salaries or wages made by the City Council subsequent to the passage of the budget, we nevertheless call your attention to the law on this subject as expressed above.

You next ask whether the recent decision invalidates the making of transfers from one appropriation to another within the same department or between departments. We had occasion recently, to pass on this question in response to an inquiry from the city treasurer, and we advised that officer that transfers authorized by the City Council, when limited to the general uses for which the appropriations are made, are entirely lawful. It would not be proper to devote moneys appropriated for the use of one department or for a special purpose to another department or to an entirely different purpose, but a transfer, even to a different department, when it is to be used for the same purpose as originally intended must be regarded as lawful. Our decision in this respect is based on the fact that the City Council, in passing its annual appropriation bill, has particularized to a much greater extent than the statute requires it to do. This being so, and it having had authority in the first instance to group a large number of individual items into one item of the appropriation bill, we see no reason why this right cannot be exercised at any time, even if for convenience

and for accounting purposes the various individual items have been named in the appropriation bill.

We quote as follows from our opinion to the City Treasurer:

“The statute (Art. VII, Sec. 2 of C. & V. Act) requires that the objects and purposes for which appropriations are made shall be specified. The question as to the extent of the details which must be given has never been passed on directly by the courts, although their attitude has been indicated by numerous decisions. It may be regarded as certain that no court will require such an elaboration as to hamper the business of a municipality.

“Many of the subdivisions of the appropriations made annually are intended more to induce the departments to systematize their work and to enable the accounting force to exercise a closer surveillance over expenditures than to bring the same within the strict requirements of the statute. To illustrate: There is no reason why impersonal services should be distinguished from personal services other than salaries and wages except for the purpose of keeping a better check on the sums paid out for each of these purposes; in fact, they were formerly included in one appropriation. Again, the appropriation for printing and stationery are separated from those for library, furniture and fittings, whereas an appropriation so worded as to include the general office requirements of a bureau would undoubtedly be within the strict letter of the statute.

“To further illustrate the point we make we call attention to the opinion of the court in the case of *People ex rel. Fuller v. Peoria, D. & E. R. R. Co.*, 116 Ill. 410. The entire appropriation ordinance of the City of Mattoon is set forth in this opinion. It contains only seven items, which really amount to appropriations in bulk. Yet the court, while not directly passing on the question, in several places in that opinion, seems to sanction same as a proper appropriation ordinance, and it decided the question of the validity of the tax levy on the failure to publish this ordinance. The court first speaks of the item for interest on bonds and then says: ‘After deducting \$4,300, from \$26,300, it will be seen that Section 1 appropriates \$22,000, in certain specified amounts for six specified objects.’ (p. 417.)

“In the case of *City of East St. Louis v. Flannigan*,

34 Ill. App. 596, a similar ordinance appropriating in bulk, was approved by the court.

"Consequently, while the City Council has minutely subdivided the appropriations, it should not be assumed that such separation of items operates to deprive the City Council of the power to transfer the money so appropriated to an extent which would not, if appropriated in bulk, be unlawful.

"In the case of *City of Chicago v. Berger*, 100 Ill. App. 158, it was held that an appropriation made for purposes of track elevation could properly be transferred from the department for which it was appropriated to the law department, to be used for legal expenses in connection with track elevation.

"There are other decisions in which it was held that, while payments must be confined to the purpose mentioned in the appropriation until its requirements are met, a surplus may be applied by the City Council to any other lawful debt contracted by the city.

City of East St. Louis v. Flannigan, 34 Ill. App. 596;

People v. City of Cairo, 50 Ill. 154.

"Our conclusion, however, is based not so much on the cases where it was actually adjudicated that a transfer of funds was legal, as on the fact that the City Council, in making such transfers as proposed in this case and in the many others where the general purpose of the appropriation remains the same, is only exercising a legal right which it could have exercised originally by combining the items. Such transfers cannot be carried on to an unreasonable extent, but to the extent indicated above they are proper. In other words, where the appropriation made for a bureau or department is merely shifted in such a way as to take care of unforeseen exigencies, it cannot be said that the appropriation for such bureau or department has been misapplied."

We do not find it necessary to change the opinion we gave the treasurer on this point since the recent decision contains nothing that would cause us to alter our views.

Your last question is, whether the appropriation of \$20,000 for expenses in connection with the Eastland disaster made on July 26th was of such a nature as to be covered

by the section of the statute which designates as legal appropriations made subsequent to the first quarter if they result from a casualty.

The proviso relating to appropriations of this character is as follows:

“* * * *Provided, however,* that nothing herein contained shall prevent the City Council or Board of Trustees from ordering, by a two-thirds vote, any improvement, the necessity of which is caused by any casualty or accident happening after such annual appropriation is made. The City Council or Board of Trustees may, by a like vote, order the mayor or president of the Board of Trustees and Finance Committee to borrow a sufficient amount to provide for the expense necessary to be incurred in making any improvements, the necessity of which has arisen as is last above mentioned, for a space of time not exceeding the close of the next fiscal year—which sum, and the interest, shall be added to the amount authorized to be raised in the next general tax levy, and embraced therein. * * *”

(Art. VII, Sec. 3, Cities and Villages Act.)

The only question that can be raised concerning the validity of the appropriation for expenses in connection with the Eastland disaster is whether the words “improvement” and “any improvements” are broad enough to include the use of the money for the emergency expenses that arose as a result of this casualty.

We do not believe that the courts would adopt so narrow a construction of these words as to deny the city authorities the right to appropriate the money necessary to meet an emergency caused by an unforeseen calamity of this kind. The only adjudicated case which is a guide on this point is the case of *City of Chicago v. Peck*, 98 Ill. App. 434 (affirmed in 196 Ill. 260), where the court held that such an extraordinary appropriation was lawful to meet the emergency caused by a small-pox epidemic. It held that an appropriation for the lease of premises for a small-pox hospital was proper. It is true this was an “improvement” in the strictest sense of the word, so that it does not bear strongly on the point in question, but the inference is plain, upon

reading the case, that the court would uphold an appropriation for any expenditure under such conditions as might be deemed proper by the city's officers.

In the present instance, a part of the funds were used for immediate and urgent expenses made necessary by an emergency. They were expenses which no city officer could be expected to do otherwise than incur under the circumstances. The balance was and is now being used for the purpose of bringing about some permanent reform in respect to the handling of excursion steamers. This would come within the meaning of the word "improvement."

Therefore, while the matter is not absolutely free from doubt, it may be regarded as reasonably certain that the courts would regard the appropriation of July 26th as valid.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Order Concerning Investigation of City Attorney's Office.

November 10, 1915.

HON. WM. HALE THOMPSON, Mayor.

Dear Sir:

In compliance with your request concerning the validity of an order passed by the City Council at its last session relative to City Attorney Charles Francis, and the power of that council to carry out the provisions of said resolution, we advise you as follows:

All of the powers of the City Council, with a few exceptions which are not at all relevant to our present inquiry, are embodied in Section 1 of Article V of the so-called Cities and Villages Act. We find in that section ninety-eight specific enumerations of the powers of the council.

A municipal corporation is a subsidiary governing body of the state.

Byrne v. General Ry. Co., 169 Ill. 75.

And the rule, that the powers of the government of the state are divided by the Constitution into three distinct departments, the legislative, executive and judicial, therefore applies to municipalities, which are state agents, as well as to their principal, the state.

People v. Olson, 245 Ill. 288.

The law department is clearly an executive or administrative branch of the government, and as such is distinct from the City Council, which is the legislative branch, and neither has any authority or control over the other, unless such authority or control is expressly granted by legislative act, and in this connection it must be borne in mind that, inasmuch as the City Council is a creature of the Legislature, it is possessed of such powers, and only such powers, as the Legislature has seen fit to confer upon it.

It will not require any argument to substantiate the contention that Section 1 of Article V of the Cities and Villages Act does not confer any authority upon the City Council to conduct an investigation of any officer of another department.

When, however, we carry our inquiry further to determine, if we may, where, if anywhere, the Legislature has seen fit to repose the power and authority to investigate the offices and employes of the city, we find in Section 14 of the Civil Service Act abundant authority to accomplish the purpose under consideration. That section provides:

“The commission shall investigate the enforcement of this act and all its rules, and the action of the examiners herein provided for, and the conduct and action of the appointees in the classified service in its city, and may inquire as to the nature, tenure and compensation of all offices and places in the public service thereof. In the course of such investigations each commissioner shall have power to administer oaths, and said commission shall have power to secure by its subpoena

both the attendance and testimony of witnesses, and the production of books and papers relevant to such investigations.”

In the first sentence of this section we have two subjects considered and provided for. That sentence first provides that the commission shall investigate the enforcement of the act, its rules, and the action of its examiners and the conduct and action of the appointees in the *classified service* in its city. The action referred to in this portion of the sentence is made mandatory. Then, in addition to the mandatory action above referred to, the Legislature in its wisdom evidently concluded that appointees of the city, other than those in the classified service, should at some time or other be the subject of an investigation, and to cover this class of municipal employes this same sentence provides that the Civil Service Commission *may* inquire as to the nature, tenure and compensation of *all* offices and places in the public service of such city.

It is a familiar canon of construction that the expression of one thing in a legislative act implies the exclusion of all others, and, therefore, when the Legislature, by apt language as is here found, confers upon the Civil Service Commission authority to investigate all places and appointees both in the classified service and other places of employment in the city, that language is to be taken as negating the idea that similar power of investigation is conferred upon any other body or person.

If it could, by any stretch of imagination, be contended that there was anything found in the Cities and Villages Act conferring upon the City Council or any other body or person authority to conduct an investigation of the nature of that now under consideration, the fact, that the Civil Service Act was passed after the Cities and Villages Act, would of itself constitute a repeal by implication of any authority to investigate which might have been conferred upon the City Council.

But we might go much further in this inquiry and—putting all questions heretofore discussed aside—find that

even the Civil Service Commission is without authority under the circumstances involved in the order of the council, in that the investigation in the order contemplated is not one concerning the conduct by Mr. Francis of his office, but, on the contrary, pertains to his conduct as a citizen relative to matters altogether outside of his office and to his conduct as a citizen of the City of Chicago and not as City Attorney of the City of Chicago. So that if the Civil Service Commission were found to be clothed with authority to conduct the investigation contemplated by the order in question, then we would be compelled to conclude by the same logic that the investigating power could investigate any citizen of Chicago who is in nowise connected with the city or the administration of its affairs.

But to pursue our inquiry still further, if we were to assume that the City Council has authority to conduct or direct an investigation of the nature of that here under consideration, where is the authority to bring before the council or any committee thereof witnesses and evidence? None is to be found. On the contrary, we find that the Civil Service Commission, by virtue of Section 14 above referred to, "shall have power to secure by its subpoena both the attendance and testimony of witnesses, and the production of books and papers relevant to such investigations." But if we were to go further, and conclude that the council or its committee, appointed to conduct the proposed investigation, could procure the attendance before it of a horde of willing witnesses, where is to be found the power or authority of the council or any committee thereof to administer oaths to those witnesses? Again none is to be found. But again, we find abundant authority in this regard conferred upon the Civil Service Commission, which by this same Section 14 has power to administer oaths.

We, therefore, unhesitatingly conclude that the order under consideration is unconstitutional, without the power of the City Council to pass, and void.

Yours truly,

CHARLES M. HAFT,

Approved: *First Assistant Corporation Counsel.*

SAMUEL A. ETTELSON,
Corporation Counsel.

Permit for Purchase of Revolver by Owner of Shooting Gallery.

November 10, 1915.

MESSRS. VON LENGERKE & ANTOINE, 128-32 South Wabash Avenue.

Gentlemen :

Your communication of the 5th inst. wherein you wish to be advised if it is necessary for a person who keeps, conducts and operates a licensed shooting gallery to secure from the general superintendent of police a permit to purchase revolvers to be used for target practice in licensed shooting gallery, has been referred to me, and in reply I beg to state as follows :

An ordinance passed by the City Council under date of May 25, 1914, and appearing upon pages 418 and 419 of the Council Journal, amending an ordinance passed by the City Council May 11, 1914, and appearing on pages 186 and 187 of the Council Journal, is as follows :

“SECTION 4a. It shall be unlawful for any person, firm or corporation to sell, barter or give away to any person within the City of Chicago, any pistol, revolver, derringer, bowie knife, dirk or other weapon of like character which can be concealed on the person, except to licensed dealers and to persons who have secured a permit for the purchase of such articles from the general superintendent of police as hereinafter required; provided, this section shall not apply to sales made of such articles which are to be delivered or furnished outside the City of Chicago.

“SECTION 5. It shall be unlawful for any person to purchase any pistol, revolver, derringer, bowie knife, dirk or other weapon of like character, which can be concealed on the person, without first securing from the General Superintendent of Police a permit so to do. Before any such permit is granted, an application in writing shall be made therefor, setting forth in such application the name, address, age, height, weight, complexion, nationality and other elements of identification, of the person desiring such permit, and the applicant shall present

such evidence of good character as the General Superintendent of Police in his discretion may require.

"SECTION 6. It shall be the duty of the General Superintendent of Police to refuse such permit to

(a) All persons having been convicted of any crime.

(b) All minors.

"Otherwise, in case he shall be satisfied that the applicant is a person of good moral character, it shall be the duty of the General Superintendent of Police to grant such permit, upon the payment of a fee of one dollar.

"SECTION 8. Any person, firm or corporation violating any of the provisions of this ordinance, shall be fined not less than Fifty Dollars (\$50.00) nor more than Two Hundred Dollars (\$200.00) for each offense, and every purchase, sale or gift of any weapon mentioned in this ordinance shall be deemed a separate offense."

It would seem from the above sections that the intention of the City Council was to exercise the power to determine the manner in which deadly weapons may be sold. The section of the ordinance requiring a permit from the general superintendent of police before a person can lawfully purchase a revolver was for the purpose of keeping a record of all revolvers sold in the City of Chicago.

The ordinance giving the city power to restrict and regulate the sale of firearms is a separate and distinct ordinance from the one giving the city power to grant licenses to persons to keep, conduct and operate a shooting gallery.

I am, therefore, of the opinion that a person must first secure a permit from the general superintendent of police before he can purchase a revolver to be used in a shooting gallery for target practice.

Yours very truly,

CHARLES E. PEACE,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Legality of Indicating Device on Water Pipes Used Exclusively for Fire Protection.

November 12, 1915.

TO THE SUPERINTENDENT OF WATER, Chicago, Illinois.

Dear Sir:

Your request of the 11th inst., to the corporation counsel for an opinion as to the legality of a proposed amendment to Section 2778 of The Chicago Code of 1911 has been referred to me for reply.

The proposed amendment provides for an indicating device to be placed on all water pipes in connection with the city water main entering large premises and used exclusively for fire protection; that water pipes used exclusively for fire protection and connected on the street side of water meters controlling water pipes entering any premises shall also be provided with such indicating device; that such indicating device or devices are for the purpose of indicating the flow of any water through the piping to which they are attached and are to be of a type, design and size to be approved by the commissioner of public works, and shall be so constructed as to permit an uninterrupted flow of water when necessary.

The proposed amendment further provides that no charge shall be made for city water supplied and used through such pipes for extinguishing fires or on account of evaporation.

The proposed amendment further provides that whenever such exclusive fire protection water pipes so equipped with indicating devices are cross-connected with the water piping system on the house side of the water meter controlling city water for domestic purposes, or are used to supply city water for any purpose other than for fire protection exclusively, such water pipes shall be controlled by water meters to accurately measure the flow of water through such pipes. Such meters to be of a type, design and size to be approved by the commissioner of public works and to be installed at the cost and expense of the owner or consumer; that upon

neglect or refusal of the owner or consumer after ten days' written notice to provide approved water meters and make a sufficient deposit to reimburse the city for the expense of installing the same, the commissioner of public works may cause the city water supply to be cut off from said premises to enforce compliance with such ordinance and his lawful requirements thereunder; that the amount charged for water flowing through any such meter, if used for extinguishing fire, shall be deducted from the books of the Bureau of Water on proper showing of such fact.

The proposed amendment further provides for quarterly inspection of all such exclusive fire protection water piping systems by the chief of the Bureau of Fire Prevention and Public Safety or under his direction, and for the submission of a report of the condition of such exclusive fire protection water and piping systems to the superintendent of water.

By Section 3 of Article X of the Cities and Villages Act (R. S. 1909, Chapter 24, Par. 171), it is provided:

“The city council or board of trustees shall have power to make all needful rules and regulations concerning the use of water supplied by the water works of said city or village, and to do all acts and make such rules and regulations for the construction, completion, management or control of the water works, and for the levying and collecting of any water taxes, rates or assessments, as the said city council or board of trustees may deem necessary and expedient;”

By Section 4 of an act entitled, “An act authorizing cities, incorporated towns and villages to construct and maintain water works,” approved and in force April 15, 1873, Revised Statutes 1909, Chapter 24, Par. 257, it is provided:

“The common council of such cities, or trustees of such towns or villages, shall have power to make and enforce all needful rules and regulations in the erection, construction and management of such water works, and for the use of water supplied by the same. And such cities, towns and villages shall have the right and power to tax, assess and collect from the inhabitants thereof such tax, rent or rates for the use and benefit of water

used or supplied to them by such water works, as the common council or board of trustees, as the case may be, shall deem just and expedient."

In the case of *Anderson v. Village of Berwyn*, 135 Ill. App. 8, wherein the validity of an ordinance passed by the village board was involved, and also the question whether or not the village board exceeded its powers in adopting an ordinance providing certain rates of charges for water sold or supplied by the village, for the installation of meters at the cost of the consumer and for the shutting off of the water supply of consumers who failed to comply with the provisions of the ordinance by causing a meter to be installed on their premises within a certain time, the court, referring to Section 4 of the Act of 1873, *supra*, on page 17 of its opinion, said:

"We do not doubt that the village of Berwyn has the power under the above provisions to adopt the ordinance in question. The provisions of the ordinance are clearly within the powers delegated by the express provisions of the statute. A grant of power to provide a supply of water and to prevent its waste, and to make all needful rules and regulations concerning the use of water supplied by the village and to make such rules and regulations for the management or control of the water works, and for the levying and collecting of water rates as the board of trustees may deem necessary or expedient is sufficiently broad and comprehensive to cover every provision of the ordinance to which our attention has been directed. *Wagner v. Rock Island*, 146 Ill. 139; *Prindiville v. Jackson*, 79 Ill. 337. A municipal corporation clothed with the powers conferred by the statutes above referred to, may require persons taking water from the public water works to furnish and pay for water meters to measure the water taken by them. *State v. Gosnell*, 116 Wis. 606; *Wagner v. Rock Island, supra*".

We are of the opinion that the City Council has full power and authority to adopt the proposed amendment as above described, and that such amendment constitutes a

lawful exercise of such powers as are expressly delegated to the city by the General Assembly.

Very truly yours,

ROY S. GASKILL,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

**Street Railway Companies' Obligation With Respect to
Cost of Bridges and Viaducts.**

November 12, 1915.

HON. W. R. MOORHOUSE, Commissioner of Public Works.

Dear Sir:

Your favor of recent date, wherein you wish to be advised if the street railway company is bound to pay any portion of the cost of bridges and viaducts, received.

In reply thereto, we beg to say, Section 13 of each of the ordinances in question is in part as follows:

“The company shall only be required to operate said through lines across or over any river or canal until the city or some third party shall provide and maintain a bridge across the same upon which it may operate its cars.”

“Exhibit A” of the Chicago Railway Company’s ordinance contains the provision giving the right to the company to construct, maintain and operate a double track upon, along and across all bridges and viaducts in or crossed by any of the streets or parts of streets in said “Exhibit A.”

It would seem from the provisions of Section 13 of each of the ordinances in question that the street railway company is not required to operate its lines across or over any river or canal until the city or some third party shall provide and maintain a bridge across the same upon which it may operate its cars, and therefore, the railway company

is not bound to pay any portion of the cost for the construction of bridges. The same rule would apply to the construction of viaducts as to the construction of bridges, and we are of the opinion the railway company is not bound to pay any portion of the cost for the construction of viaducts.

Having arrived at the conclusion that the railway company is not required to pay any portion of the cost for the construction of bridges and viaducts to operate its cars across or over, the next question to consider is, should the railway company be required to pay any portion of the cost for repairing said bridges and viaducts?

Section 15 of each of the ordinances in question is in part as follows:

“The company shall, at its own expense, fill, grade, pave and keep in repair that portion of the streets occupied by it as more specifically provided for in ‘Exhibit B.’”

The first question for determination is whether bridges and viaducts are streets or parts of streets within the meaning of the word “streets” as the word street is used in the ordinances imposing the obligation upon the company to keep in repair that portion of the street occupied by its tracks, which is more specifically set out in “Exhibit B.”

A portion of “Exhibit B” is as follows:

“The company, as respects filling, grading, paving, keeping in repair, sweeping, sprinkling, keeping clean or otherwise improving the streets, or parts of streets occupied by its railway, shall fill, grade, pave, keep in repair, sweep, sprinkle and keep clean and free from snow eight (8) feet in width of all streets and public ways or portion thereof occupied by it with a single track railway and sixteen (16) feet in width of all streets and public ways or portion thereof occupied by it with a double track railway.”

The weight of authority in well considered cases, we believe, holds that bridges are streets or parts of streets.

Nellis on Street Railways, Volume 1, Section 162, says:

“A bridge has been held not to be a part of a street, it being also said that the term ‘pave’ does not apply

to the reflooring of a bridge within an ordinance requiring it to pave the space between the rails on any street being paved, particularly where bridges are named several times and distinct from streets, avenues and highways. *Cedar Rapids v. Cedar Rapids M. & C. Ry. Co.*, 108 Iowa 406, 79 N. W. 125. In a recent case, however, in this connection it has been decided that bridges maintained by a steam railroad over its tracks and across which street railway tracks are laid are streets within the meaning of an ordinance granting a franchise to a street railway company to lay its tracks upon the street upon which such a bridge is maintained, on condition that it keep a certain portion of such street in repair. *Northern Cent. Ry Co. v. United Rys. & Elec. Co.*, 105 Md. 345. * * *

Nellis on Street Railways, Volume 1, page 162, in discussing the case of *Northern Central Railway v. United Railways & Electric Company*, *supra*, in the footnote says:

“In 1868 an ordinance was passed providing for the raising of the grade of a city street, so as to permit a railroad company entering the city to construct its tracks under the street which was carried overhead by means of a bridge. Theretofore an ordinance had been passed granting a street railway company permission to lay double tracks upon this street on condition that it should keep the portion of the street covered by its tracks and two feet on either side thereof, in repair. The same permission on the same conditions was granted another street railway company on a parallel street. No distinction was made by charter or ordinance, between streets and bridges, and both railway companies laid their tracks on such bridges. It was held that such bridges were streets, so far as the duty to keep the streets in repair was concerned, and that the railroad company, which was required to keep the entire bridge in repair, could recover over against the street railway company for its proportion of the expense, based on the portion of the bridge which the ordinance required it to keep in repair.”

In the case of the *Northern Central Railway Company v. United Railways & Electric Company*, *supra*, the court, in giving its opinion, said:

“* ~* * If the right so to use the bridges is a part of the contract then it must be subject to the con-

dition upon which the right is granted. In *North Baltimore Passenger Railway Co. v. The North Avenue Railway Co.*, 75 Md. 243, Judge Alvey has said, 'Where a contract with a municipality is susceptible of two meanings, one restricting, the other extending powers of the other party, that is to be adopted which works least harm to the municipality. In other words where there is a want of plainly expressed intention, the construction should be beneficial to the public,' and that language was used in construing a grant made by the city to a street railway company for the use of its streets. * * *

"The weight of authority in well considered cases sustains the view expressed in 75 Md. *supra*. In the case of *Chicago v. Powers*, 42 Ill. 169, plaintiff's intestate stepped off one end of an unlighted draw bridge spanning a stream which crossed the line of a city street and was drowned. The defense was that though the city had power to lay a tax to light its streets, that power did not include the lighting of bridges. But the court rejected this defense and said, 'It seems to us to be obvious that a bridge over a stream crossing a street, is a part of the street. It is as much so as the cover placed over a drain, or a sewer crossing a street. Persons travel over it as they do over other portions of the street. It is, and must be, a part of the street.'

"In *McDonald v. Ashland*, 78 Wis. 251, a bridge built by a private citizen with lumber furnished by the city and forming part of a platted street used by pedestrians was held to be a public way; and in *Birmingham v. Rochester City Railway Co.*, 137 N. Y. 13, a bridge over a canal intersecting a highway was held to be part of the highway, the court saying 'In substance and effect it is nothing more than a continuation of the city street.'

"In the case of *Cedar Rapids v. Railway Co.*, 108 Iowa 406, the city granted the right of way to lay its tracks on 'the streets, avenues and bridges of the city,' but in terms imposed the duty of repairs only as to paved streets. * * *"

We are, therefore, of the opinion that a bridge is a part of a street within the meaning of the ordinances which impose upon the street railway company the liability "to keep in repair, sweep, sprinkle and keep clean and free from snow eight (8) feet in width of all streets and public ways or portions thereof occupied by it with a single track and

sixteen (16) feet in width of all streets and public ways or portions thereof occupied by it with a double track," and that the street railway companies are bound to pay their portion of the cost of repairing of the bridges and viaducts on which they operate cars to the extent of eight (8) feet in width for a single track and sixteen (16) feet in width for a double track.

Very respectfully,

CHARLES E. PEACE,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Notice of Lien on Special Assessment Vouchers.

November 13, 1915.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

Replying to your letter of the 9th inst., in which you enclosed a communication from Loewenthal & Co., requesting this department for an opinion as to the legality of a lien notice filed with your department, where the owner or assignee of special assessment vouchers delivers vouchers to you for the purpose of securing bonds in lieu thereof, and there being no lien on file or notice thereof given such owner or assignee at the time of the delivery of such vouchers, but while said party is waiting for said bonds to be written up and delivered to him a lien notice is filed under the statute.

Opinions have been rendered by this department holding that a lien notice filed after the delivery of a special assessment voucher comes too late and that the money needed to pay the same is placed beyond the reach of any claim, as follows:

March 17, 1910, by Assistant Corporation Counsel
Wm. D. Barge.

March 6, 1912, by Assistant Corporation Counsel
George L. Reker.

An opinion was also rendered holding that the lien notice is valid.

October 11, 1915, by Assistant Corporation Counsel
Edward H. Wright.

The holder of the vouchers contends that having delivered the vouchers and asked for bonds, if the bonds had been delivered then and there, there being no lien notice on file, he would have his bonds and the lien notice would be of no force, but the city delayed the delivery of the bonds and in the meantime a lien notice had been filed.

I see no occasion for again quoting all the statutes and decisions referred to in the opinion of October 11, 1915.

Chapter 82, Paragraph 37, Section 23 (Hurd's Revised Statutes of 1913) Mechanic's Lien Act, reads as follows:

"Any person who shall furnish material, * * * shall have a lien on the *money, bonds or warrants* due or to become due * * *: Provided, such person shall, before payment or delivery thereof is made * * * notify the city * * * of his claim by a written notice.
* * *

For the city to refuse to recognize the lien notice under the statute just quoted, would be a violation of the law. The inquirer indicates that the "money, bonds and warrants" are still in the possession of the city and notice of lien has been filed.

The comptroller's office has a large volume of business to transact and it does not hold back the issuing of bonds purposely, but issues them in the ordinary course of business.

I am, therefore, of the opinion that the lien notice is binding upon the City of Chicago, notwithstanding the fact that the vouchers were delivered some time before the lien notice was filed, and if the city were to "pay money, issue bonds or warrants" now, it would do so at its own risk and would be liable to the party serving the notice.

My attention has been called to the fact that it has been the practice to disregard lien notices after the issuance of a voucher, and that to change the procedure now

would upset the market on special assessment vouchers and perhaps add a burden upon the tax-payers because of this uncertainty; but in answer to that I would suggest that the purchasers of such paper should require the contractor to make a statement under oath, such as the lien law provides in other cases, setting forth that there are no outstanding liens and that all material men have been paid, and if not paid the question of an outstanding lien would be settled then and there; and if the affiant makes a false statement upon which he has obtained money, the Criminal Code could be invoked. Such a procedure would protect the purchasers of these vouchers and give them no cause for complaint at this late hour.

Yours very truly,

ANTON T. ZEMAN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTTELSON,
Corporation Counsel.

Ordinance Requiring Hotels to Keep Registers.

November 15, 1915.

HON. OTTO KERNER, Chairman, Committee on Judiciary.

Dear Sir:

You submitted to us an ordinance which compels hotels to keep a hotel register and providing that said register shall at all times be open to the inspection of the mayor, chief of police and the police officers of the City of Chicago and their assistants, and providing penalties for the non-enforcement thereof, on which you ask the following questions:

First: Is there any hotel register law?

Second: Does the ordinance conflict with the state law?

In answer to the first question, we desire to state that on September 30, 1915, we submitted an opinion to Honor-

able Charles C. Healey, General Superintendent of Police, in which the retention of registers in hotels and the jurisdiction over the same was therein set forth. A copy of said opinion, we enclose herewith.

Section 17 mentioned therein is the only state law under the statutes governing registers in hotels.

In answer to your second question, we desire to state that Section 15 of Chapter 126a of the Hurd's Revised Statutes of Illinois, provides as follows:

"15. SUPERVISION OVER WHAT LODGING HOUSES, ETC.)
 §15. The State Board of Health shall have supervision of all lodging houses, boarding houses, taverns, inns and hotels, in cities of one hundred thousand inhabitants or more, as hereinafter provided. They shall from time to time inspect, or cause to be inspected, all such lodging houses, boarding houses, taverns, inns and hotels, to see that the provisions of this act are duly and properly observed by the landlords, proprietors, keepers, managers and clerks, of such lodging houses, boarding houses, taverns, inns and hotels; and any landlord, proprietor, keeper, manager, clerk, employe, or other person connected with any such lodging house, boarding house, tavern, inn or hotel, who shall interfere with or obstruct any such inspection, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not exceeding \$100. (As amended by act approved May 10, 1901. In force July 1, 1901. L. 1901, p. 304; Legal News Ed., p. 245.)"

The ordinance submitted is in direct conflict with Section 15, as under the above section hotels in cities of 100,000 inhabitants, or more, are under the direct supervision of the State Board of Health, and the regulation thereof is specifically set forth in Sections 15, 16, 17 and 18 of said Chapter 126a. The ordinance submitted can be termed a regulation ordinance, and the Legislature has not delegated to the cities and villages of this state the power to license or regulate hotels, and the same could not be passed and enforced under Clause 66, Section 1 of Article V of the Cities and Villages Act, which reads as follows:

"To regulate the police of the city or village and pass and enforce all necessary police ordinances."

City of Chicago v. M. & M. Hotel Co., 248 Ill. 264.

On January 7, 1907, the City Council passed an ordinance which contained a section in reference to hotel registers practically the same as the ordinance submitted, and the power of the city to enforce the same was taken to the Supreme Court of this state. It was there held, in the case of *City of Chicago v. M. & M. Hotel Co.*, 248 Ill. 285, that:

“While the hotel business has an aspect of public interest which might warrant the Legislature in passing a law to license and regulate such business or to delegate to cities and villages the power to pass ordinances for that purpose, yet such power has not been exercised and an ordinance for that purpose passed by a city is without authority and void.”

And in concluding its opinion, the court said, on page 275:

“We are of the opinion that the ordinance under which plaintiff in error was convicted is *void in its entirety for want of power in the city to pass it.*”

We are therefore of the opinion that the jurisdiction and supervision over hotels and the only law governing the same is that conferred by the State Legislature upon the State Board of Health; that the ordinance submitted is in direct conflict with said state law conferring such power upon said board; that there is no delegation of power to cities and villages by the Legislature in reference to the licensing and regulation of hotels, and that the ordinance submitted, if passed, would be invalid and void.

We return herewith the copy of the ordinance and other communications submitted by Mayor Wm. Hale Thompson and Hon. Charles C. Healey, General Superintendent of Police.

Yours very truly,

BENTON F. KLEEMAN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Deficit in Appropriations for Street Lighting.

November 15, 1915.

HON. WM. G. KEITH, Commissioner of Gas and Electricity.

Dear Sir:

We are in receipt of your letter of recent date, in which you ask for an opinion as to certain matters arising on account of deficits in the appropriations for street lighting purposes.

It seems, from copies of the correspondence which accompanies your letter, that, unless some provision is made for taking care of the expenses for the balance of the year or some arrangement is made with the persons or corporations furnishing the supplies and service, it will be necessary to discontinue the lighting of the streets of the city.

Your first inquiry is as to your liability on your bond for contracting obligations in excess of the amount appropriated for a specific purpose.

The danger of liability on your bond is remote. An action for debt or damages on an obligation of this kind will accrue only in case the city is caused loss or damage on account of the failure or neglect of the officer to perform his duty under the law. The bond runs to the city, and while we do not go so far as to maintain that the city is the only party to whom a right of action can under any circumstances accrue, we have no hesitation in saying that a party contracting with the city cannot look to your bond in case he fails to recover. He is bound to take notice of the condition of the appropriation, and his remedy, in case of failure to pay, if he has any, is against the city.

There is, however, an insuperable obstacle in the way which prevents you from making a contract for work or materials where no appropriation has been previously made for same. Such action would not only be contrary to Sec. 4 of Art. VII of the Cities and Villages Act which we quote below, but it would also be in violation of Section 208 of the Criminal Code, which prescribes a heavy penalty for

contracting for the expenditure of a greater sum of money than may have been lawfully appropriated or set apart for that purpose.

Hence, we are bound to advise you that you cannot make a contract for purposes of street lighting when the fund to be drawn on for payment is exhausted.

Nor is it possible to legalize such a transaction by means of council action. If your question as to whether it is necessary to secure authorization by the City Council relates to such a transaction, we beg to call your attention to the following section of the statute, which prohibits the City Council itself from making such a contract:

“§4. No contract shall be hereafter made by the city council or board of trustees, or any committee or member thereof; and no expense shall be incurred by any of the officers or departments of the corporation, whether the object of the expenditure shall have been ordered by the city council or board of trustees or not, unless an appropriation shall have been previously made concerning such expense, except as herein otherwise expressly provided. (See ‘Criminal Code,’ ch. 38, §208).”

Cities and Villages Act, Art. VII, Sec. 4.

It does not follow, however, that you will not be protected if the City Council directs you to make some arrangement by which the service and supplies may be obtained without entering into a formal contract, and we recommend that some council action should be taken which will have the effect of making you the agent of the City Council in the matter before you make such a request of the present contractors as is indicated below.

You also ask for an opinion as to the advisability of making the arrangement suggested by the Chairman of the Committee on Finance. This suggestion is that you make arrangements with the persons and corporations now furnishing supplies and service, under the contracts heretofore entered into payable from the street lighting accounts, to carry you for the balance of the year, with the understanding that the Finance Committee will provide in next year's budget for sufficient funds to cover the unpaid bills.

As stated above, if this suggestion contemplated the making of contracts for which no appropriation is now available, it would be absolutely unlawful to do so. We do not apprehend, however, that such is the purpose in view, since the chairman of the Finance Committee and the comptroller both understand the law on this point.

We surmise that it is the intention to ask these contractors to continue to supply the city and trust to the good faith of its officers to provide for compensation when the money can be lawfully paid to them. We recommend in this connection, that these parties should be informed that the appropriations are exhausted and that there is no legal way of contracting with them for the balance of the year, or at least until the Legislature acts on bills that will be submitted and introduced at the forthcoming extraordinary session. They may also be informed that it is the intention of the city authorities to pay for such service and supplies as they may furnish as soon as it can be legally done.

If they then continue to furnish same they will be in the position of contractors who have furnished the city with service and supplies which the city has authority to contract for if done in the proper manner, and of which the city has availed itself and received the benefits.

Authorities are not wanting to the effect that under such conditions there is an implied contract on the part of the city to pay for the benefits which it has received.

2 Dillon on Mun. Corp., 5th Ed., Sec. 793.

Maher v. City of Chicago, 38 Ill. 267.

Badger v. Inlet Drainage District, 141 Ill. 540.

Sanitary District v. Blake, 179 Ill. 167.

It may be said that to make such an arrangement is in effect contracting with these parties, in view of the above authorities and others that may be cited along the same lines. But we apprehend that no liability will attach to you personally on account of such an arrangement if you act as the agent of the City Council in carrying out their wishes. An order could be passed directing you to request

the present contractors to continue to furnish the service and supplies until such time as a contract for same could be legally entered into. If the furnishing of same would then raise the legal presumption of an implied contract the responsibility for same would rest with the City Council.

Our opinion on the three points about which you inquire is therefore as follows:

1. You will not be liable under your bond for asking the present contractors to continue their work in connection with street lighting.

2. It is not advisable for you to make such a request without an order of the City Council directing you to do so.

3. No council action can authorize the making of a contract where the appropriation is exhausted and there are no funds available for the purpose, but such action will protect you from responsibility if you make a request in pursuance of same with a full understanding on the part of the contractor that you are doing it as the agent of the City Council; and it is possible that such a request on the part of the council and compliance with same by the contractor may result in an implied contract to pay for services and supplies furnished by the contractor and accepted by the city.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

**Revocation of Certificate of Appointment of Special
Patrolmen.**

November 15, 1915.

HON. WM. HALE THOMPSON, Mayor.

Dear Sir:

Your request to the corporation counsel for an opinion concerning the validity of an order passed by the City

Council at its meeting held on November 8, 1915, and appearing on page 2097 of the Journal of the Proceedings of the City Council of said date, has been referred to the undersigned.

Said order is as follows:

“ORDERED, That the general superintendent of police be and he is hereby directed to revoke the certificate of appointment of each special patrolman appointed by him to do strike duty at any of the garment manufacturers’ shops during the present garment workers’ strike; that the general superintendent of police compile and present to this council a complete list of all of the special policemen, private guards and sluggers in the service of the garment manufacturers incidental to the present garment workers’ strike, together with a list of their former occupations, and their criminal records, if any, the names of any detective agencies or other persons or corporations through whom, or by whom, they were hired in their present employment; that the general superintendent of police prevent the congregating of private guards, special policemen, or sluggers outside of the premises of any of the garment manufacturers; that he enforce the same rules against all employes of the clothing manufacturers that are sought to be enforced against strikers, especially with reference to keeping them moving when on the street, preventing their standing or congregating at the doors of the clothing shops, making hostile demonstration, or by threats, carrying weapons, or otherwise, breaking the peace.”

Certain sections of The Chicago Code of 1911, as amended, provide:

“1907. There is hereby established an executive department of the municipal government of the City of Chicago, which shall be known as the Department of Police, and shall embrace the general superintendent of police, a first deputy superintendent of police, a second deputy superintendent of police, a chief of detectives,
* * *

“1908. * * * The general superintendent of police shall appoint according to law all the officers and members of said department, and shall have the power to remove from the Police Department and the service

of the City of Chicago any member thereof in the manner provided by law."

"1910. Subject to the provisions of this ordinance the management and control of all matters relating to the Department of Police, its officers and members, are hereby vested in the general superintendent of police.
* * *

It shall be the duty of said general superintendent of police to preserve the peace and secure good order and cleanliness within the City of Chicago, and to that end he shall enforce all laws and city ordinances and the orders of the City Council and of the mayor of the City of Chicago."

"1919. The general superintendent may, in time of peril, danger, riot, or pestilence, or apprehension thereof, or with the written consent of the mayor, during any public election or celebration, appoint for a specified time as many special patrolmen from among the citizens of Chicago as he may deem necessary, and during the term of service such special patrolmen shall possess all the powers and privileges and perform all the duties of patrolmen of the standing police force of the city."

"1921. He shall have power, on the application of any person or persons showing the necessity therefor, to appoint and swear in any additional number of special patrolmen to do special duty at any fixed place within the city, at the charge and expense of the person or persons by whom the application is made and shall keep a correct list of all persons so appointed. He shall issue a special certificate of appointment to each of said special patrolmen and shall, upon receiving a deposit sufficient to cover the cost thereof, provide them with suitable badges which shall be worn by them while on duty, and be returned to said general superintendent upon the termination of their appointment."

"1922. DUTIES AND POWERS OF SPECIAL PATROLMEN.) Persons so appointed shall conform to and be subject to all rules and regulations governing the police force of the city, and to such special rules and regulations as the general superintendent may make concerning such police patrolmen. They shall possess all the powers, privileges and duties of the regular police patrolmen, at the places for which they are respectively appointed, and may be removed or discharged from service at any time by the general superintendent, without assigning any cause therefor."

“1926. The general superintendent of police shall herein determine all cases not under the jurisdiction of any trial board authorized by law, for the violation of any rule, regulation or order of said department, or other breach of discipline, and shall have power to punish the offending party by reprimand, or forfeiture of pay for a specified time, or dismissal from the force.”

It is apparent, from a perusal of the ordinances hereinabove set forth, that the power of appointment, supervision and control of special patrolmen is unqualifiedly vested in the general superintendent of police. The Council Order in question, by its terms, purports to divest the general superintendent of police of the power conferred upon him by law under and by virtue of the above mentioned ordinances.

The question as to what legal effect a Council Order has, where it concerns a matter involved in an ordinance duly passed by the City Council, must be considered. There is a material difference between an ordinance, an order, and a resolution, of the City Council.

“An ordinance cannot be amended, repealed, or sustained by a resolution or other act of less dignity than itself.”

C. & N. P. R. R. Co. v. City, 174 Ill. 439.

People v. Latham, 203 Ill. 23.

American v. Spiss, 117 App. 438.

Joliet v. Petty, 96 App. 452.

Backhaus v. People, 87 App. 173.

The Supreme Court in the case of *C. & N. P. R. R. Co. v. City of Chicago*, 174 Ill., p. 445-446, said:

“A resolution or order is not a law, but merely the form in which the legislative body expresses an opinion. An ordinance prescribes a permanent rule of conduct or government, while a resolution is of a special and temporary character. Acts of legislation by a municipal corporation, which are to have continuing force and effect, must be embodied in ordinances, while mere ministerial acts may be in the form of resolutions
* * * it is well settled, that acts of municipal cor-

porations which are legislative in their character, must be put in the form of ordinances, and not of mere resolutions."

In *People v. Latham*, 203 Ill. 10, the court, at page 23, said:

"The ordinance providing for the making of the improvement, was passed on July 17, 1900; and it is said that, subsequently, on August 21, 1900, a resolution was passed providing that a contract should not be let for the remaining 2,000 feet which had not been laid, and that this resolution operated as a repeal of the ordinance as to the sidewalks specified in the resolution. But it is well settled that an ordinance cannot be repealed or amended or suspended by a resolution."

In the case of *People v. Mount*, 186 Ill., at page 578, the court said:

"An ordinance cannot be amended, repealed or suspended by a resolution. The act which amends, modifies or repeals a law should be of equal dignity with the act which enacts or establishes the law. A resolution or order is not a law, but merely the form in which the legislative body expressed an opinion."

It will be observed that Section 1910 as amended (among other things) in addition to vesting the general superintendent of police with control of all matters relating to the department, directs that he enforce the orders of the City Council. This section, to be properly construed, must be read in conjunction with the general ordinances applicable to the general superintendent of police.

Sections 1921 and 1922 above set out provide for the appointment and discharge of any special policeman by the general superintendent of police. Therefore, an order passed by the Council in contravention of these express ordinances on the subject is of no legal effect. It is conceded that the City Council has the right to exercise its power in various matters by an order or resolution, as fully set forth in the cases herein quoted.

Section 1910 referred to contemplates a direction of the council where the council may properly exercise its right

by order. The provisions contained in this section, pertaining to the enforcement by the general superintendent of police of council orders, contemplates orders involving matters not otherwise mentioned in the various sections of the Police Department ordinances which are conferred upon the general superintendent of police, and not orders in derogation thereof.

The legislative authority and power with which the City Council is vested is derived from an act of the State Legislature, and any action which the City Council takes must be in conformity with such authority and power. In conclusion, we desire to state, as we have already noted, that an ordinance of the City Council, duly passed, cannot be repealed, amended or in any wise abrogated by means of any action of less solemnity and dignity, such as an order or resolution.

We are, therefore, of the opinion, in view of the foregoing well settled authorities, that this order is null and void.

Yours very truly,

W. H. DEVENISH,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Applications for Disability Pensions of Police Officers No Longer on the Force.

November 17, 1915.

TO THE HONORABLE, THE BOARD OF TRUSTEES
OF THE POLICE PENSION FUND OF CHICAGO.

Gentlemen:

We are in receipt of the applications of the above named parties requesting that a pension be granted them under the Police Pension Fund Act. All of the above named applicants had been separated from the police force for some

years prior to their making application for a pension, and it appears from an examination of their petitions, together with the affidavit and the report of the medical examiner, that their reasons for applying for a pension at this time is based upon the fact that they participated in the Haymarket Riot on May 4, 1886, and received injuries.

From an examination of the records of the above-named applicants, it appears that none of them served in the Police Department for a period of twenty years as provided in Section 3 of the Police Pension Fund Act, and consequently they can assert no rights under Section 3 of the Police Pension Fund Act, which provides in substance that after twenty years' service a policeman shall be granted a pension.

The exact date that the applicants were separated from the Police Department is not stated, except in three instances. One is the case of Frederick Wellman, who states that he was discharged under general order No. 32 issued by Joseph Kipley, General Superintendent of Police. It appears in the affidavit filed in the case of Thomas Brophy that he was discharged on February 26, 1888. It also appears from the petition of James B. Short that he was discharged from the department by an order of the Civil Service Commission August 1, 1900. All of the other applicants claim that they were separated from the department prior to July 1, 1895, when the Civil Service Law went into effect.

Section 12 of the Police Pension Fund Act of 1915 provides in part as follows:

“Section 12. All persons, who, upon the taking effect of this Act, are entitled to or receiving pensions under an act entitled: ‘An Act to provide for the setting apart, formation and disbursement of a police pension fund in cities, villages and incorporated towns’ (approved April 29, 1887, in force July 1, 1887), as subsequently amended, shall receive no further payment under said act, but shall in lieu thereof be entitled to the benefits provided for in this Act * * *.”

By the provisions of the above act, any rights the above named applicants had under the Act of 1887 are

preserved to them, and they are not deprived from now asserting any rights they might have had under the Act of 1887.

Their rights, however, must be subjected to and controlled by the terms and provisions of the Act of 1887. Under the present pension law, they can only assert such rights as they had under the law of 1887, and the mere fact that their rights under the law of 1887 have been preserved by the new law, does not mean that they have been given any greater rights under the Pension Act of 1915.

Section 4 of the Act of 1887 provided:

“PHYSICAL DISABILITY—RETIRED FROM ACTIVE SERVICE.) §4. Whenever any person, while serving as a policeman in any such city, village or town, shall become physically disabled while in, and in consequence of, the performance of his duty as such policeman, said board shall, upon his written request, or without such request, if it deem it for the good of said police force, retire such person from active service and order and direct that he be paid from said fund a yearly pension, not exceeding one half the amount of the yearly salary attached to the rank which he may have held on said police force for one year next preceding such retirement; *Provided*, that whenever such disability shall cease such pension shall cease.”

Section 5 of the Act of 1887 provided:

“CERTIFICATE OF DISABILITY.) §5. No person shall be retired as provided in the next preceding section, or receive any benefit from said fund, unless there shall be filed with said board certificates of disability, which certificates shall be subscribed and sworn to by said person and by the police surgeon (if there be one) and two practicing physicians of such city, village, or town, and such board may require other evidence of disability before ordering such retirement and payment as aforesaid.”

Section 7 of the Act of 1887 provided:

“REPORTING TO CHIEF FOR EXAMINATION—SERVICE IN CASES OF EMERGENCY.) §7. Any person retired for disability under this act, may be summoned to appear be-

fore the board herein provided for, at any time thereafter, and shall submit himself thereto for examination as to his fitness for duty, and shall abide the decision and order of such board with reference thereto. And all members of the police force who may be retired under the provisions of this act, except those who voluntarily retire after twenty years' service, shall report to the chief of police of the city, village or town where so retired, on the second Tuesday of each and every month, and in cases of emergency may be assigned to, and shall perform such duty as said chief of police may direct, and such persons shall have no claim against the city, village or town for payment for such duty so performed."

We beg to advise your board that in accordance with the provisions of the Pension Act of 1887, the above named applicants had the right to apply for retirement on account of disability for injuries received while in the service of the Police Department at any time before their separation from the department. You will observe that Section 7 of the Act of 1887 required all members of the police force retired in accordance with the provisions of Section 4 to report to the chief of police once every month, and it is further provided by the Act of 1887 that in case of emergency they may be assigned to such duty as the chief of police may direct. While, therefore, the statute of 1887 provided that a policeman physically disabled while in and in consequence of the performance of his duty might be retired from active service, it regarded him as still a member of the police force, notwithstanding such retirement and subjected him to the right to be assigned by the chief to duty in case of emergency.

A careful consideration of the above sections of the Act of 1887, after the application of the fundamental rules governing the construction of statutes, compels us to advise you that the Legislature intended that the terms and provisions of Section 4 of the Act of 1887 were intended for the benefit of policemen actually in the service, and who, on account of injuries received while on duty were incapacitated for further police duty. We beg to advise you, that

in order for applicants for a pension to bring themselves within the purview of the above section, it is necessary for them to show that they are members of the police force at the time their application for a pension is filed. The language of the statute in requiring them to report to the chief of police and be subjected to his orders in cases of emergency, clearly show that it was the intention of the Legislature that applicants for pensions under Section 4 must be duly authorized police officers.

We have searched the Act of 1887 in vain to find where any power was conferred upon the board to hear and determine, under Section 4, applications for pensions of persons not active members of the police force. When these applicants were separated from the Police Department without having made application for a pension on account of disabilities received by them while in the service of the Police Department, they lost their right to apply for pensions under Section 4 of the Act of 1887. That right has not been restored to them under the law of 1915.

The power of the Board of Trustees of the Police Pension Fund to grant a pension under Sections 4 and 5 of the Police Pension Act of 1887 was passed upon by the Appellate Court in the case of *McGann v. Harris*, reported in 114 App. 308, and in that case the Appellate Court spoke as follows:

“Appellee was not, apparently, under the protection of the Civil Service Act, and whatever may have been the reason assigned for his discharge, it does not appear and is not claimed that the discharge was not at the time lawful even if unjust. He can only be reinstated by rightful authority, and until reinstated, it is not, we think, in the power of the board to retire and pension him.”

This same question was again presented to the Appellate Court in the case of *People ex rel. Thomas T. Freeman v. The Board of Police Pension Fund Commissioners of the City of Chicago*, reported in 116 App. 252, and in that case the court, speaking through Mr. Justice Stein, said:

“In *McGann v. Harris*, *supra*, we held that under the wording of the act the application must be made while the applicant is still a member of the police force,

and we see no reason for changing or modifying our views.''

The Board of Trustees of the Police Pension Fund of the City of Chicago is in the nature of a quasi-municipal corporation, created by statute and possesses only such power as the Legislature has seen fit to confer upon it. It has jurisdiction only upon matters where the jurisdiction has been expressly conferred by statute. It possesses no power to review the action of the Civil Service Commission in discharging a member of the Police Department. It possesses no power to review the action of the mayor or chief of police in discharging any member of the Police Department. One of the applicants here in question petitions this board for a rehearing of charges heard against him by the Civil Service Commission some years ago.

In view of what we have already said it is needless for us to say that your board has no power whatever to entertain such a petition. If these applicants have any grievance to urge against the manner in which they were separated from the Police Department this board is not the proper tribunal for them to apply to, however unjustly they may have been treated in being separated from the Police Department in the manner they claim they were. Your board can afford them no aid in righting what they claim to be a serious wrong. For these applicants to bring themselves within the purview of Section 4 of the Act of 1887 or Section 4 of the Act of 1915, they would have to show that they were members of the Police Department at the time of their application for a pension. Much as we sympathize with these applicants, our duty is clear under the law.

We, therefore, beg to advise your board that you do not possess any power or authority to entertain the application of the above named applicants for a pension.

Respectfully submitted,

JAMES W. BREEN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Powers and Duties of Mayor Under the Act Creating a State Board of Arbitration.

November 17, 1915.

HON. WM. HALE THOMPSON, Mayor.

Dear Sir:

I have been directed by the corporation counsel to advise you with respect to your powers, duties and legal status in re State Board of Arbitration, being "An Act to create a State Board of Arbitration, etc." approved and in force August 2, 1895.

The only provision in this act which in any way affects the mayor of a city is the following provision of Section 6a of said act, being part of Section 5276, Illinois Annotated Statutes, 1913 (Jones & Addington).

"5276. MAYOR TO COMMUNICATE FACT OF THREATENED STRIKES AND LOCKOUTS—CHIEF EXECUTIVE OFFICER OF LABOR ORGANIZATION TO PERFORM LIKE DUTY.) § 6a. It shall be the duty of the mayor of every city, and the president of every incorporated town or village, whenever a strike or lockout involving more than twenty-five employes shall be threatened, or has actually occurred within or near such city, incorporated town or village, to immediately communicate the fact to the State Board of Arbitration, stating the name or names of the employer or employers and of one or more employes, with their postoffice addresses, the nature of the controversy or difference existing, the number of employes involved and such other information as may be required by the said board. * * *"

Section 5269 sets out the duties of said board as follows:

"5269. CONTROVERSY BETWEEN EMPLOYER AND EMPLOYES—INQUIRY—HEARING—DECISIONS.) §2. When any controversy or difference not involving questions which may be the subject of an action at law or bill in equity, exists between an employer, whether an individual, co-partnership or corporation, employing not less than twenty-five persons, and his employes in this state, the board shall, upon application as herein provided, as

soon as practicable thereafter, visit the locality of the dispute and make a careful inquiry into the cause thereof, hear all persons interested therein who may come before them, advise the respective parties what, if anything, ought to be done or submitted to by vote to adjust said dispute, and make a written decision thereof. This decision shall at once be made public, shall be recorded upon proper books of record to be kept by the secretary of said board, and a short statement thereof published in the annual report hereinafter provided for, and the board shall cause a copy thereof to be filed with the clerk of the city, town or village where said business is carried on."

Sections 5274 and 5275 outlines additional powers of said board:

"**ADDITIONAL POWERS TO DETERMINE CONTROVERSIES CONFERRED.**) §5b. Whenever two or more employers engaged in the same general line of business, employing in the aggregate not less than twenty-five persons, and having a common difference with their employes, shall, co-operating together, make application for arbitration, or whenever such application shall be made by the employes of two or more employers engaged in the same general line of business, such employes being not less than twenty-five in number, and having a common difference with their employers, or whenever the application shall be made jointly by the employers and employes in such a case, the board shall have the same powers and proceed in the same manner as if the application had been made by one employer, or by the employes of one employer, or by both."

"**5275. STRIKE OR LOCKOUT—DUTY OF BOARD.**) § 6. Whenever it shall come to the knowledge of the state board that a strike or a lockout is seriously threatened in the state, involving an employer and his employes, if he is employing not less than twenty-five persons, it shall be the duty of the state board to put itself in communication as soon as may be, with such employer or employes, and endeavor by mediation to effect an amicable settlement between them, or to endeavor to persuade them to submit the matters in dispute to the state board."

None of these sections contain any act or provision vesting a mayor with any other duty or power in connection

with any proposed arbitration, and he has no voice with respect to its decision or any right to participate in its deliberations. The above quoted provisions seem merely to have placed the duty upon the mayor, as being one of the persons most likely to be informed as to the fact whether or not a strike or lockout is threatened or shall have actually occurred with any city. Upon giving the notice provided for in said act, the mayor's connection with the strike or lockout, in so far as the above mentioned act is concerned, ceases.

Yours very truly,

F. B. TEED,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Validity of Certain Vacations.

November 18, 1915.

HON. JOHN D. RILEY, Superintendent of Maps.

Dear Sir:

Replying to your communication of September 23, 1915, asking for an opinion as to the validity of two purported vacation instruments vacating certain alleys therein, I beg to report concerning each document as follows:

(1) Vacation Document No. 1,668,389, dated the 5th day of May, 1892, and recorded the 19th day of May, 1892, vacating the alleys running east and west in blocks one and two and the alley running north and south in block one, legally described as follows:

“Leather's Sub. of the N. $10\frac{1}{4}$ Acs. of the W. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of Sec. 13, 39, 13, lots facing Arlington, Taylor, Filmore Streets and Campbell Avenue.”

I find on the date of the vacation, from a personal examination of the records in the recorder's office, that John W. Hedenberg and Henry W. Leman were the owners in

fee simple of all lots in blocks one and two, except lots one to six, inclusive, in block two, owned by the City of Chicago, and that William H. Chenoweth had a leasehold interest therein.

The subdivider of this property created what is known as a statutory dedication and vested the legal title to the streets and alleys in the City of Chicago. The city accepted the plat of the streets and alleys in question prior to the vacation, by exercising the right in laying 36-inch water mains in 1898 and sewer pipes under assessments, as shown by the plats attached to your letter. It also paved Taylor street in 1904.

Since the acceptance in the form I have indicated, the city has apparently acquiesced in this vacation and abandoned its interest in the alleys. Shortly after the dedication of the alleys herein referred to the firm of Haywood Bros. & Wakefield Co. constructed factory buildings and a lumber yard, which, according to the records of the map department, are five and six story buildings and these buildings cover the entire ground of block one, and the lumber yard covers the entire part of block two, excepting the lots owned by the city and the alley west thereof. Since the alleys have no opening at one end, adjoining the private alley indicated on the map, I assume that the public never had a chance to use same.

These alleys have remained closed for over twenty years, and, while the statute of limitations does not run against the City of Chicago, nevertheless the doctrine of equitable estoppel, by reason of the abandonment consequent upon non-user, could be properly invoked. After allowing the construction of buildings and making expensive improvements, to now ask the occupants to reconstruct and rearrange yards which would cost considerable money, would clearly be inequitable.

Remy v. City of Chicago, 268 Ill. 597, 602.

Reichert Milling Co. v. Freeburg, 217 Ill. 384, 389.

People v. City of Rock Island, 215 Ill. 488.

City of Carlinville v. Castle, 177 Ill. 105.

Jordan v. City of Chenoa, 166 Ill. 530.

Village of Auburn v. Goodwin, 128 Ill. 57.

City of Peoria v. Johnson, 56 Ill. 45.

It is true the city did not join in this vacation as the owner of certain lots in block two, but the vacation does not abridge or destroy the rights of the City of Chicago as a part owner because the alley adjoining its property is open and affords access thereto and therefrom at either Taylor or Filmore streets.

Chicago Anderson Pressed Brick Co. v. City of Chicago, 138 Ill. 628, 633.

I am of the opinion, therefore, that the city would not be able to maintain a suit in ejectment, by reason of the doctrine of equitable estoppel.

(2) Vacation Document No. 2,336,882, dated the 10th day of January, 1896, and recorded on the 21st day of January, 1896, vacating all of lots one to forty-five, or parts thereof, including Grenshaw street and the alleys therein referred to, legally described as follows:

“Silverman’s W. 12th Str. Sub. of the W. $\frac{1}{2}$ of the S. $9\frac{1}{4}$ Acs. of the W. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of Sec. 13, 39, 13, lots facing Filmore, Grenshaw and W. 12th Streets.”

I find on the date of the vacation, from a personal examination of the records in the recorder’s office, that the Aermotor Company was the owner in fee simple of all of the lots described in said subdivision, and that John W. Hedenberg had an easement or interest therein. This property adjoins the other land herein referred to and is occupied by the Aermotor Company, who are manufacturers of windmills, and the entire premises are covered with buildings running from one to five stories in height.

The subdivider of this property failed to comply with the statute in all respects and, therefore, the dedication is only a common law one and the city merely acquired an easement in the alleys and street, but the fee remained in the owner. As to what use the city made of these alleys and street, I am unable to state, but the fact remains that

since the vacation herein referred to extensive and expensive improvements have been made and the doctrine of estoppel could be better invoked in a case of this kind than in a case where the dedication is a statutory one.

I am, therefore, of the opinion that the city is estopped at this late day from claiming any right or interest in the alleys or Grenshaw street, as set forth in this subdivision.

Yours truly,

ANTON T. ZEMAN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Leasing of Property by Board of Directors of Chicago Public Library.

November 18, 1915.

H. C. WILSON, Esq., Secretary Chicago Public Library.

Dear Sir:

We are in receipt of your communication of November 15th, relative to the question of the right of the Board of Directors of The Chicago Public Library to lease to the South Park Commissioners a portion of the lot at the corner of 62d street and Normal boulevard, for the purpose of erecting a building to house a transforming station and also to serve as a garage for the use of the Public Library, in which you submit the following question:

Has the board of directors of The Chicago Public Library authority to make such lease, and if not, in whom is such authority vested? Section 5 of Chapter 81 of "An Act to authorize cities, incorporated towns and townships to establish and maintain free public libraries and reading rooms," approved and in force March 7, 1872, provides as follows:

"5. ORGANIZATION—POWERS OF DIRECTORS—FUNDS.)

§5. Said directors shall, immediately after appointment, meet and organize by the election of one of their number president, and by the election of such other

officers as they may deem necessary. They shall make and adopt such by-laws, rules and regulations for their own guidance and for the government of the library and reading room as may be expedient, not inconsistent with this act. They shall have the exclusive control of the expenditure of all moneys collected to the credit of the library fund, and of the construction of any library building, and of the supervision, care and custody of the grounds, rooms or buildings constructed, leased or set apart for that purpose: *Provided*, that all moneys received for such library shall be deposited in the treasury of said city to the credit of the library fund, and shall be kept separate and apart from other moneys of such city, and drawn upon by the proper officers of said library, upon the properly authenticated vouchers of the library board. Said board shall have power to purchase or lease grounds, to occupy, lease or erect an appropriate building or buildings for the use of said library; shall have power to appoint a suitable librarian and necessary assistants, and fix their compensation, and shall also have power to remove such appointees; and shall, in general, carry out the spirit and intent of this act, in establishing and maintaining a public library and reading room."

In construing the above section, we find that the board has power to purchase or to lease ground, power to occupy, lease or erect an appropriate building or buildings for the use of a library, but nowhere in said act is the power invested in the said board to convey, lease or otherwise dispose of real estate under the control of said board, nor is said power conferred upon the City of Chicago or any other authority.

We are, therefore, of the opinion that the board of directors of the Chicago Public Library has no legal authority or power to lease to the South Park Commissioners the above described premises, nor is said power by law conferred upon the City of Chicago or any other authority.

Yours very truly,

BENTON F. KLEEMAN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Filling in Branch of River.

November 19, 1915.

HON. ADAM F. WECKLER, Harbor Master.

Dear Sir:

We are in receipt of your inquiry of November 11, 1915, in reference to the filling in of the west fork of the south fork of the south branch of the Chicago River that lies west of Ashland avenue, and to the ordinance passed June 21, 1915, vacating that portion of the river above mentioned, and as to whether or not the parties have accepted and complied with the conditions of said ordinance.

In reply, I desire to say, Section 1 of said ordinance provides: "That the west fork of the south fork of the south branch of the Chicago River lying west of the east line of Ashland avenue, except that portion of the street lying between the east and the west lines of said Ashland avenue," has been released and relinquished to the owners of the real estate abutting on that part of the west fork of the south fork of the south branch of the Chicago River.

Section 2 provides, that the First Trust and Savings Bank and The Union Stock Yard and Transit Company of Chicago, under a trust agreement dated the 1st day of April, A. D. 1909, who are the owners of said abutting real estate will, within a period of three (3) years from and after the passage and approval of this ordinance, fill in, or cause to be filled in, with suitable material to an elevation approximately the level of the present ground surface of the abutting real estate, that part of said west fork of the south fork of the south branch of the Chicago River.

Section 3 provides, in substance, that the First Trust and Savings Bank and The Union Stock Yard and Transit Company of Chicago agree to allow the City of Chicago to cross their respective properties for the purpose of using the vacated portion of said river, aforesaid, as a dumping ground, on the condition, however, that said city shall not dump any garbage or other similarly perishable matter in said vacated portion of said river.

Section 5 provides, that the City of Chicago shall construct a permanent bulkhead at or about the east line of Ashland avenue.

Section 8 provides, that the ordinance shall be in force and effect from and after its passage and approval; provided, that the First Trust and Savings Bank and The Union Stock Yard and Transit Company, and each of them, shall, within sixty days from the passage and approval of this ordinance, file with the city clerk a written acceptance of this ordinance and abide by and perform all of the conditions thereof, and shall, within sixty days, file in the office of the recorder of deeds of Cook County, Illinois, a certified copy of this ordinance, together with the plat referred to showing the portion of said river vacated.

The records show that the above parties' acceptances were filed with the city clerk on August 18, 1915, and that the same was duly recorded on August 18, 1915.

Section 8 also provides, that The Sanitary District of Chicago shall, within ninety days from the passage and approval hereof, provide by appropriate ordinance for the construction of an outlet sewer between the east line of Ashland avenue and the conduit of The Sanitary District of Chicago now connected with the west end of said west fork of said river; general plans of said sewer to be approved by the commissioner of public works of the City of Chicago; and shall also file with the city clerk of the City of Chicago within the time aforesaid a certified copy of its aforesaid ordinance, together with its agreement to comply with the terms of said ordinance.

An ordinance for said outlet sewer was passed by The Sanitary District of Chicago on September 9, 1915. Said plans for said sewer were approved by the commissioner of public works on September 16, 1915, and a certified copy of ordinance and plans filed in the office of the city clerk on September 17, 1915.

We are, therefore, of the opinion that the said west fork of the south fork of the south branch of the Chicago River lying west of Ashland avenue has been legally vacated to the owners thereof; that the acceptances of the ordinance,

as provided in Section 8, have been complied with by all parties; that the First Trust and Savings Bank and the Union Stock Yard and Transit Company of Chicago, owners of the abutting real estate to said west fork and the City of Chicago have a right to fill in said portion of the river above described with suitable material, provided they do not use or dump any garbage or other similarly perishable matter in said vacated portion of said river.

Very truly yours,

BENTON F. KLEEMAN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

**Claim for Extras on Contract for Contagious Disease
Hospital.**

November 19, 1915.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.
Dear Sir:

Replying to the request of your committee of November 17, 1915, for an opinion and recommendation relative to the claim of the John J. Brittain Company, arising by virtue of extra work done in connection with the installation of certain caissons at the contagious disease hospital, we advise you that in our opinion such claim should not be allowed.

This department has already passed on the legality of the claim in question. (See opinion of corporation counsel of July 15, 1915, p.)

One of the legal barriers to the allowance of this claim in excess of \$35,000 specified in the contract is found in Paragraph 116a, Chapter 24, Hurd's Revised Statutes, which provides in part as follows:

“Any work or other public improvement except any work or public improvement to be paid for in whole or

in part by a special assessment shall, when the expense thereof shall exceed \$500, either be constructed by contract let to the lowest responsible bidder in the manner prescribed by ordinance (*Provided, however, any such contract may be entered into by the proper officers without advertising for bids, by a vote of two-thirds of all the aldermen or trustees elected;*) * * *."

Another legal barrier to the allowance of said claim is found in Section 2102 of The Chicago Code of 1911, which provides:

"2102. CONTRACT—EXTRA WORK.) Where any work or job is done or is being done for the city under contract, no payment shall be made on such contract for any work not specified in such contract, and no money shall be paid beyond the prices specified in such contract for any work, labor or material necessary for, or used in, completing the work provided for by such contract.

"Where any contract is entered into on behalf of the city with any person, firm or corporation for the doing of any work or job, no extra work upon the undertaking or job authorized in such contract shall be ordered or authorized to be done by the commissioner of public works, or by any officer or agent of the city which will involve the expenditure of any money over and above the amount specified and fixed as the contract price in and by such contract, unless the express authority of the City Council be first procured for such extra work and for the expenditure of the amount to be paid therefor.

"In any case where work is done under contract with the city under the supervision of the commissioner of public works and it shall be the opinion of the said commissioner that in order to properly complete such work, extra work not provided for in such contract will have to be done, or additional expenditures not provided for in such contract will have to be made, said commissioner shall submit a report in writing to the City Council, setting forth fully what extra work is desired, the necessity therefor and the amount of money necessary to be expended in and about such extra work."

The foregoing provisions of the statute and of the

ordinance, would in themselves, constitute a sufficient legal barrier to preclude the payment to the Brittain Company of the claim in question, in so far as any amount in excess of the aggregate sum of \$35,000 is involved.

Where there is a statute or ordinance prescribing the method by which an officer or agent of a municipal corporation may bind the municipality by contract, that method must be followed, and there can be no implied contract or implied liability of such municipality.

Roemheld et al. v. City of Chicago, 231 Ill. 467.

“Where the agents of a city are restricted by law as to the method of contracting, the city cannot be bound otherwise than by a compliance with the conditions prescribed for the exercise of the power. (*School Directors v. Fogelman*, 76 Ill. 189; *Tamm v. LaValle*, 92 *id.* 263; *Rogne v. People*, 224 *id.* 449.) The performance of work or furnishing material for a city and the acceptance of the resulting benefits will not render it liable to pay if the work was not authorized. The fact that the labor is beneficial will not create a liability.”

Roemheld v. City of Chicago, *supra*.

Pells v. City of Paxton, 176 Ill. 318.

A party dealing with a municipal body is bound to see to it that all the mandatory provisions of the law are complied with, and if he neglects such precaution he becomes a mere volunteer and must suffer the consequences.

15 Am. & Eng. Encyc. of Law, 1086, 1087.

Rogne v. The People, 224 Ill. 449.

Another legal barrier to the allowance of said claim is found in the following express provisions of the contract dated March 16, 1915, between the John J. Brittain Company and the city:

“73. The City of Chicago hereby agrees, in consideration of the covenants and agreements specified to be kept and performed by the party of the first part, to pay to said party of the first part when this contract shall be wholly carried out and completed on the part of said contractor, and when said work shall have been accepted by the commissioner of public works, a sum

equal to the market price of the labor and material used in doing said work, plus ten per cent (10%) thereof, also the cost of the bond given herewith."

"90. In no event shall the amount to be paid hereunder exceed the sum of Thirty-five Thousand (\$35,000.00) Dollars, all of which is in accordance with an order of the City Council, passed March 29, 1915, and published in the Journal of the Proceedings of the City Council." (See page 4117.)

"113. The right is reserved to the City of Chicago, through its commissioner of public works, to make alterations in the plans or specifications for the work included herein. Should it become proper or necessary, however, in the execution of the work, to make any alterations which will increase the expense, said commissioner of public works shall report to the City Council the nature of such alterations and his estimate of the amount by which the expense to the city should be thereby increased. The amount by which the contract price shall be increased in consequence of such alterations shall be determined by the City Council."

"119. It is expressly understood and agreed that no payment shall be made to said party of the first part for any extra work or material or of any greater amount of money than is herein stipulated to be paid, unless some changes in or additions to the contract requiring additional outlay by said party of the first part shall first have been expressly authorized by the City Council of the City of Chicago and ordered in writing by the said commissioner of public works."

The contract dated September 24, 1914, contains all of the provisions above quoted, except as to price—the amount specified being \$199,875 for the entire work complete as specified in said contract.

We are of the opinion that the foregoing provisions of the statute and ordinance, and the contract itself, constitute insuperable barriers to the allowance of the claim in question.

Very truly yours,

ROY S. GASKILL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Suppression of Meetings.

November 19, 1915.

HON. HERMAN F. SCHUETTLER,

First Deputy Superintendent of Police.

Dear Sir:

Your letter of the 30th ult. addressed to the corporation counsel, requesting an opinion as to the right of the Police Department to suppress meetings in the loop district, was referred to the undersigned for reply.

From a careful perusal of your inquiry we take it that you are particularly interested at this time in meetings that are being frequently held in Holden court, a public way located in the business district of our city. We desire to state at the outset, that what we say in the following includes the situation with regard to Holden court.

The Constitution of Illinois of 1870 guarantees the right of free speech and the right of free assemblage, in Article II, Sections 4 and 17.

The only specific ordinance that we have treating with the subject of open air public meetings is Section 2433 of The Chicago Code of 1911, which provides as follows:

“No parade or procession shall be allowed upon any street or public way in the city, nor shall any open air public meeting be held upon any ground abutting upon any street or public way in the city until a permit in writing therefor shall first be obtained from the Police Department.”

You will readily see that the ordinance as drawn contemplates parades or processions to be held *upon the streets* and open air public meetings to be held *upon ground abutting upon any street*. The phrases, “any streets” and “ground abutting upon any streets” are used in strict contradistinction, and it would be difficult for the ordinance to indicate more clearly than it does that they are not intended to mean the same thing.

We call attention to Section 2439 of the Code, which provides:

“2439. BLOCKADES.) Whenever, from any cause, any street or alley in the city shall be obstructed, the

mayor, or any alderman or police officer may give such directions in regard to the movement of pedestrians, vehicles and street cars as may be required by public convenience.

“Any person or persons refusing or neglecting to obey such directions shall be fined not less than one dollar nor more than twenty-five dollars for each offense.”

It is a well settled doctrine of our law that a sidewalk is a part of a street, and there can be no question from the above section as to the authority of a police officer to keep the streets, sidewalks and alleys free and clear of congestion when it interferes with public use or convenience.

The below quoted sections of Chapter 38, Hurd's Revised Statutes, 1913, provide as follows:

“249. RIOT.) If two or more persons actually do an unlawful act, with force or violence, against the person or property of another, with or without a common cause of quarrel, or even do a lawful act in a violent and tumultuous manner, the persons so offending shall be deemed guilty of a riot, and shall severally be fined not exceeding \$200, or confined in the county jail not exceeding six months.

“251. UNLAWFUL ASSEMBLY.) If two or more persons shall assemble together to do an unlawful act, and separate without doing or advancing towards it, such persons shall be deemed guilty of an unlawful assembly, and be severally fined not exceeding \$100.

“252. UNLAWFUL ASSEMBLY.) If two or more persons assemble for the purpose of disturbing the public peace, or committing any unlawful act, and do not disperse on being desired or commanded so to do by a judge, justice of the peace, sheriff, coroner, constable or other public officer, the persons so offending shall be severally fined not exceeding \$200.

“253. SUPPRESSION.) When twelve or more persons, any of them armed with clubs or dangerous weapons, or thirty or more, armed or unarmed, are unlawfully, riotously or tumultuously assembled in any city, village or town, it shall be the duty of each of the municipal officers, constables and justices of the peace thereof, and of the sheriff of the county and his deputies, to go among the persons so assembled, or as near to them as they can safely go, and in the name of the state command them immediately and peaceably to dis-

perse; and if they do not obey, such officers shall command the assistance of all persons present, in arresting and securing the persons so unlawfully assembled; and every person refusing to disperse or to assist as aforesaid, shall be deemed one of such unlawful assembly, and shall be fined not exceeding \$500, and confined in the county jail not exceeding one year; and each such officer having notice of such unlawful assembly, and refusing or neglecting to do his duty in relation thereto, as aforesaid, shall be fined not exceeding \$200.

“254. REFUSAL TO DISPERSE.) When persons so riotously or unlawfully assembled neglect or refuse, on command as aforesaid, to disperse without unnecessary delay, any two of the magistrates or officers aforesaid may require the aid of a sufficient number of persons, in arms or otherwise, and proceed in such manner as they judge expedient to suppress such riotous assembly, and arrest and secure the persons composing it; and when an armed force is thus called out, they shall obey the orders for suppressing such assembly and arresting and securing the persons composing it, which they receive from the governor, any judge of a court of record, the sheriff of the county, or any two of the magistrates or officers mentioned in the preceding section.”

From an examination of the foregoing statutes and ordinances it will be observed that they are all susceptible of being applied to the subject of your inquiry. When the manner of holding these meetings or the conduct of those in attendance at same is such as constitutes a violation of any of the provisions we have heretofore referred to, there can be no question as to the right of the Police Department to act.

We are therefore of the opinion that the manner of holding these meetings and the conduct of those in attendance at same solely determines the right of the Police Department to interfere with them when held in the “loop” district.

Very truly,

W. H. DEVENISH,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTIELSON,

Corporation Counsel.

Sale of Beverage Known as Alpha.

November 20, 1915.

HON. C. C. HEALEY, General Superintendent of Police.

Dear Sir:

Your letter of the 13th inst. addressed to the corporation counsel, in which you request an opinion as to whether the beverage known as Alpha can be sold without a dram-shop license, has been handed the undersigned for reply.

In your letter you state that the said beverage contains 27/100 of one per cent of alcohol, or a fraction over one-quarter of one per cent; that the internal revenue department has ruled that this beverage may be sold without a liquor license, the same as Coca Cola and other popular beverages.

You also submit with your letter analysis of the Health Department showing that the sample analyzed contains alcohol by the volume 0.65 per cent and by weight .49 per cent.

The Dram-shop Act (Chapter 43) of the statute provides, Section 1, "That a dram-shop is a place where spirituous or vinous or malt liquors are retailed * * * and intoxicating liquors within the meaning of the act." Section 2: "Whoever, not having a license to keep a dram-shop, shall * * * sell any intoxicating liquor in less quantity * * * shall be fined or imprisoned, etc."

Section 1525 of The Chicago Code of 1911 defines a dram-shop to be "a place where spirituous, malt, vinous or intoxicating liquor of any kind whatsoever is sold, given away * * * in quantities of less than one gallon, * * *."

A leading case on this proposition is the case of *Hewitt v. People*, 186 Ill. 336. The court in said case, at page 341, states the rule as follows:

"The provisions upon the subject taken together, amount to this; that the legislature defined a dram-shop, and selected spirituous, vinous and malt liquors, and branded them as intoxicating without proof of their in-

toxicating character; that they authorized a license to keep a dram-shop and sell intoxicating, malt, vinous, mixed or fermented liquor, and provided that without such license the sale of any intoxicating liquor should constitute an offense and subject the offender to punishment.

“Under the statute it is sufficient to prove that a defendant sold spirituous, vinous or malt liquor, without proving their intoxicating quality, but as to other liquors it must be proved, as a question of fact, that they are intoxicating. * * *”

This department on various occasions has ruled with reference to similar beverages containing alcohol, and in all of said rulings we have refused to say that liquor containing a percentage of two per cent or less of alcohol may be sold without a license.

(See Volume 3, Opinions of Corporation Counsel, page 380 (7/27/08), July 29, 1909;

Volume 5, Opinions of Corporation Counsel, page 674 (2/13/12).)

On October 15, 1915, this department was asked for an opinion, as to whether or not a beverage known as Tempo Tonic could be sold without a license and in answer to said communication we refused to say whether or not the sale of the same is prohibited under the Dram-shop Ordinances of the city and state. We quote from said opinion, as follows:

“If evidence can be produced showing that the liquor mentioned is either spirituous, vinous or malt, the sale thereof without a license would be prohibited by the statutes of Illinois and the dram-shop ordinances of the City of Chicago, should such evidence prove that the liquors are used as a beverage, although in fact not intoxicating. On the other hand, if such Tempo Tonic is not a malt or vinous or spirituous liquor, the sale likewise is prohibited by the aforementioned ordinance, if the same is intoxicating. This is a question of fact to be determined by each particular article sought to be sold.”

We stated in opinion 2/13/12 *supra*, that the mere pres-

ence of alcohol in liquor does not in itself make the same a spirituous liquor. However, it is a strong element that should be considered in determining whether or not such beverage is a spirituous liquor.

Spirituous liquor is defined in our text-books as follows:

“Liquor composed fully or in part of alcohol produced by distillation; * * * such liquors as contain alcohol, and thus have spirit, no matter by what name denominated, or in what liquid form or combination they may appear; that which is in whole or in part composed of alcohol extracted by distillation; liquor containing much alcohol; distilled; whether pure or compounded, as distinguished from fermented; ardent.”

36 Cyc. 806.

This department has said that the courts will take judicial notice that certain well known liquors are spirituous, vinous or malt liquors. For example, whiskey, gin and rum, are spirituous. Wine is a vinous liquor and lager beer is a malt liquor; and, further, we have held that the mere presence of alcohol in the proportions named (i. e. less than two per cent) * * * would not of itself establish the fact that such liquors are either spirituous or vinous or malt liquors. (See Opinions 2/13/12, *supra*, page 675.)

It is my opinion that in view of the fact that Alpha contains alcohol, which ingredient has been held by our courts to be a spirituous liquor, the Police Department should not permit the sale thereof unless it can be positively proven in a court of competent jurisdiction that the said Alpha does not come within the prohibition of our Dram-shop ordinances. It is not fair that a liquor, which in itself is suspicious for the alcohol which it contains should be sold *ad libitum*, while other liquors of which the courts take judicial notice must be sold under a heavy license for which the city collects a large revenue. I, therefore, believe that it is the duty of the Police Department to prevent the sale of Alpha unless the manufacturers thereof can judicially determine, as a matter of fact, that the same may be sold under an ordinance without a license. The fact that the

unlicensed sale thereof is not prohibited by the government will not justify its sale if prohibited by the statutes or city ordinances. Our Federal courts have repeatedly held that liquor regulations come within the police power of the state.

Mugler v. Kansas, 123 U. S. p. 623.

Wiseman v. Tanner, 221 Fed. Rep. p. 699.

U. S. v. Oregon-Washington R. & N. Co., 210 Fed. Rep. p. 380.

Schuyler v. Littlefield, 232 U. S. Rep. p. 707.

Very truly yours,

LOUIS SALINGER,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

**Garages—Distances from Churches, How Measured—
Frontage Consents—Building—Defined.**

November 22, 1915.

HON. CHARLES J. FORSBERG, City Collector.

Dear Sir:

A protest has been filed by a number of property owners in the vicinity, against the maintenance of a garage at No. 5625 Glenwood avenue. A license was issued for same. Subsequent to its issuance the protest aforementioned was made. The remonstrants claim that the garage is (a) within two hundred feet of the Swedish Evangelical Lutheran Church, (b) that two-thirds of the buildings on both sides of the street in the block where such garage is located are used exclusively for residence purposes—by reason whereof, frontage consents, under the city ordinances are required, but same were not obtained.

At the request of the remonstrants the matter was set for hearing before yourself and the undersigned to determine the issues. Considerable testimony was heard herein

and there does not seem to be any serious dispute as to the questions of fact involved. The entire matter is purely a legal one, wherefore you have requested me to give you an opinion thereon.

The ordinances of the City of Chicago relating to the location of garages, passed July 17, 1911, as amended December 7, 1914, provide as follows:

"It shall be unlawful for any person, firm or corporation to locate, build, construct or maintain any garage within two hundred feet of any building used as and for a hospital, church or public or parochial school, or the grounds thereof, and it shall be unlawful for any person, firm or corporation to locate, build, construct or maintain any garage in the city on any lot in any block in which two-thirds of the buildings on both sides of the street are used exclusively for residence purposes, or within one hundred feet of any such street in any such block, without securing the written consent of a majority of the property owners, according to frontage on both sides of the street as provided by the ordinances of the City of Chicago; * * *."

In furtherance of the protest, a plat of a survey is produced by the remonstrants, showing the distance of said garage from the church. I have also had a plat made by the Map Department of the city showing the condition of the locality. Said latter plat substantially agrees in measurements with the former. All measurements show that by a straight line the garage is within two hundred feet of the church, measured from building to building, and a less distance from the grounds of the church to the garage building.

It is contended by the licensee that the measurement should be made by the closest traveled route. This department has heretofore interpreted this particular ordinance as to the manner of measurement, and we are committed to a ruling made September 18, 1913, with reference to the location of a garage in close proximity to a school. In that opinion (see Vol. 6, Opinions Corporation Counsel, pp. 453, 455), we held:

"That the rule to be adopted in the issuing of

permits, etc., to the conducting of garages would be that of measuring the distance by the shortest line and not by the usual route of travel, * * *."

This opinion is based on the theory that the noises naturally issuing from a garage would interfere with the pupils and the teaching force of the school, *a fortiori* would this be true when applied to the solemn services conducted in a church.

It is therefore my opinion, based on the holding of this department, that the remonstrants' objection should be sustained as to the first grounds.

Considerable evidence was introduced on the question as to whether Glenwood avenue is a street in which two-thirds of the buildings are used exclusively for residence purposes. The plat shows that the building, of which the garage forms a part, is on the east side of Glenwood avenue. The building covers a double lot. The front part of the building contains two stores with two separate entrances from the street. The entrance to the garage from the street is in the front of said building, directly north of these stores. There is one other building in the block used for store purposes. There are partition walls dividing the stores and also a rear wall separating them from the garage. It is urged that the garage should be considered one building and each of the stores separate buildings in computing the total number of buildings not used for residence purposes. If it should be held that the premises in question are to be considered as one building the licensee's attorney practically admits that no question can arise, but that two-thirds of the buildings are used exclusively for residence purposes.

The garage building in question was originally used as a warehouse, but has recently been converted into garage purposes. It was built as an entity, with one roof over the entire structure.

In the case of *Hoolihan v. Preferred Accident Insurance Company*, 111 N. Y. Sup. 1048, 1049, it was held that a hotel is a building, even though rooms thereof might be used for

separate purposes, and where a room of a building was consumed by fire, the room, even though separated, was considered likewise as coming within an insurance clause insuring the building.

Where a claimant of a mechanic's lien agreed to do work upon three structures which stood on one lot, and were connected on the street line by a framework attached to each, and there was a door placed therein for the use of occupants of both structures, and in each there were cellar windows opening upon the passway, the certificate of lien claiming a lien on a certain "building" and upon the lot was a sufficient description, notwithstanding the adaptation of the structures to separate use. *Cronan v. Corbett*. 78 Conn. 475.

Although it is difficult to find a case analogous to the one here involved, it seems manifest to me that the garage is only a part of a complete building of which the garage occupies one portion and the other portions thereof are put to separate uses in the way of stores. I do not believe the law contemplates the use to which a building is put rather than a question as to its structural condition in determining whether the same is one or more buildings.

I am, therefore, of the opinion that the garage and the two stores in question must be considered as one building. Since this is true, the said licensee cannot conduct said garage on the further ground that he has not obtained the frontage consents required under the ordinances.

In conclusion, I wish to state, it is my opinion that the protestants' objections to the maintenance of this garage are well founded in law.

Very truly yours,

LOUIS SALINGER,
Assistant Corporation Counsel.

Approved:

GEO. E. CHIPMAN,
Acting Corporation Counsel.

Wearing of Stars and Badges by Patrolmen.

November 22, 1915.

HON. C. C. HEALEY, General Superintendent of Police.

Dear Sir:

Your verbal request for an opinion asking to be advised as to the various sections of The Chicago Code of 1911, or particular ordinances, if any, pertaining to the wearing by patrolmen of stars or badges upon their outer coats in a conspicuous manner, also as to your discretionary power in carrying out such provisions, was referred to me. I, therefore, make reply to your inquiry as follows:

Section 1921 of The Chicago Code of 1911, entitled "Special patrolmen for special duty," provides as follows:

"* * * He (general superintendent of police) shall issue a special certificate of appointment to each of said special patrolmen and shall, upon receiving a deposit sufficient to cover the cost thereof, provide them with suitable badges which shall be worn by them while on duty, and be returned to said general superintendent upon the termination of their appointment."

An amendatory ordinance altering Section 1921 of The Chicago Code of 1911, passed under date of March 16, 1914 (printed Council Journal, page 4478, 1913-1914), further provides:

"When any special patrolman is engaged in duties in connection with a strike, lockout or other labor troubles, he shall wear such badge upon the outside of his outer coat in such manner that it may be easily seen and distinguished.

"Section 2. This ordinance shall take effect and be in force from and after its passage."

Section 1922, entitled "Duties and powers of special patrolmen," provides that such special patrolmen shall "conform to and be subject to all rules and regulations the general superintendent may make concerning them."

Section 1925 provides as follows:

“UNIFORMS AND BADGES.) Said general superintendent shall have power and authority to prescribe an appropriate uniform and badge to be worn by the officers and men of the department, either regular or special, and shall make suitable regulations as to the wearing of the same, by which at all times the authority and relations of such officers and men in said department may be known, as the exigency of their duties may require.”

Said above section was amended July 28, 1913 (page 1809, printed Council Journal, 1912-1913), so that it now reads “members” in both instances in which the word “men” was previously inserted.

We can find no other provision relative to the wearing of badges either as to how or where they shall be worn. We are, therefore, somewhat dubious as to the purpose or reason for the amendment of Section 1921, which requires such special patrolmen to wear their badges while on duty, which is a sufficient authority for an order on the part of the general superintendent of police to compel them to wear the badges on their outer coats, especially in view of the fact that Section 1922 provides that such special patrolmen shall conform to and be subject to such special rules as the general superintendent may make concerning them.

It does not appear that this department has been called upon at any time previously to interpret Section 1921 or to give an opinion upon the construction or the application of the same. We are, however, of the opinion that the issuing of a special certificate of appointment to special patrolmen and the providing of the same with badges is a concurrent act, and must take place simultaneously.

As to the kind of badges provided for, this is purely a discretionary matter with the superintendent of police, but upon the issuing of such badge it becomes obligatory that the same be worn in such manner as the ordinance

provides relative to special patrolmen engaged in duties in connection with a strike, lockout or other labor troubles.

Very truly yours,

H. L. BRIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTIELSON,

Corporation Counsel.

Change in Salaries During Fiscal Year.

November 22, 1915.

HON. EUGENE R. PIKE, City Comptroller, Chicago, Ill.

Dear Sir:

We are in receipt of a memorandum handed to the writer concerning the opinion recently given you on the effect of the decision of the Supreme Court in *Chadwick v. Sergel*, in which you ask some additional questions.

You first inquire whether it would be proper to pay an increased salary where the same can be paid out of salvage from salaries in the department without drawing on the additional appropriation, if the increase was authorized by an ordinance, which at the same time made an appropriation?

Your question goes to the validity of the whole ordinance, in view of the opinion of the Supreme Court to the effect that the portion of same making the additional appropriation is invalid. The rule in matters of this kind is that where the provisions of an ordinance can be separated so that one portion of same which is valid can be enforced without being affected by the other portion which is invalid, the valid portion may be enforced. This is especially true if the ordinance is drafted so that the different provisions are in different sections. We believe, therefore, that if the provisions that you referred to are so separated and appear in different sections of the ordinance in question, you would be authorized to act on that portion of same which has not been held invalid.

We deemed it proper, in the opinion above referred to, to call your attention to the law in regard to the fixing of salaries and the time for doing same.

You ask whether the increasing of a salary by the City Council by ordinance has the effect of amending the prohibition contained in Section 1646 which seems to preclude the idea of making alterations after the same are fixed in the annual appropriation bill. An amendment by implication, such as this would be, is not favored in law, yet, if the two can not stand together, the former ordinance must give place to the latter. If, however, there is any possibility of construing the two so that they may both stand, they will have to be interpreted in that way. In this instance, it is our opinion that the passage of the subsequent ordinance must be construed so that Section 1646 will be understood to contain no prohibition. In that way both ordinances will stand. Nor do we believe that the statutory provision contained in Section 3 of Part Two of Article XII of the Cities and Villages Act will interfere in the case that you present. You will find, by examining Part Two, that in a subsequent section there is a clear distinction made between city officers and municipal employees. Such being the case, Section 3 may be understood to refer to officers only as distinguished from employees. It is true, as stated in our opinion, concerning which you ask these additional questions, that in many cases the word "officers" has been interpreted to include "employees." But as these refer usually to civil service matters, it may be that the intention of the court was to limit the interpretation of the word to such cases. It is hardly likely that the Supreme Court intended that the words "officers" and "employees" should be used interchangeably at all times.

While, therefore, we are bound to admit that the questions you ask are not free from doubt, we believe you are justified in following out the provisions of the ordinances which raise salaries if the same can be paid out of salvage, as indicated above.

Our conclusions, therefore, are as follows:

(1) An increase of salary provided for by ordinance will be valid when it appears in the same ordinance as an appropriation, if you can separate the two provisions;

(2) An ordinance increasing the salary of an employe as distinguished from the salary of an officer can be regarded as valid if proper provision for payment can be made through the means of appropriations already in existence.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

**Possession of Horse and Buggy Claimed by Person Under
Indictment for Murder.**

November 22, 1915.

HON. HERMAN F. SCHUETTLER, First Deputy Superintendent of Police, Chicago.

Dear Sir:

Your request of the 11th inst. addressed to the corporation counsel for an opinion as to the right of your department to hold a certain horse and buggy, which is claimed by Clarence White, who is under indictment for murder, was referred to the undersigned for attention. You enclose with your letter one addressed to the general superintendent of police by Captain Thomas F. Meagher of the 17th District, which sets out facts in this particular case.

We desire to call your attention to the following sections, with amendments, of The Chicago Code of 1911, which provide as follows:

“1923. CUSTODIAN OF LOST OR STOLEN PROPERTY.)
The general superintendent of police shall appoint, according to law, a person to act as custodian of all property seized or taken by the police. The person so appointed shall be designated and known as the ‘custodian of lost or stolen property.’ ”

“1916a. It shall be the duty of said custodian to keep a record of all property which may be seized or otherwise taken possession of by the Department of Police of the city. If such property so seized or taken possession of shall not be claimed by the rightful owner thereof, and possession surrendered to such owner within sixty days *from the date of the final disposition of the court proceedings in connection with which said property was seized or otherwise taken possession of*, or in case there are no such court proceedings, then if such property so seized or taken possession of shall not be claimed by the rightful owner thereof and possession surrendered to such owner within sixty days of the date of such seizure or taking possession of by the Department of Police, said custodian shall publish, or cause to be published in the official newspaper of the city, a description of such property together with the date of seizure or the taking possession thereof and shall give notice that if such property be not claimed by the rightful owner or owners thereof within ten days of such publication, such property will be sold at public auction.
 * * * It is hereby made the duty of all officers and members of the department into whose possession any property seized or taken possession of shall come, to deliver the same at once to the said custodian unless it is wanted for immediate use as evidence in any case, and in that event a report and inventory of the same shall be forwarded at once to the said custodian.”

Legally speaking, this property is now in the custody of the custodian of the Police Department, and the above provisions are applicable. There are other reasons which justify the Police Department in holding this property, but we feel that the mention of the aforesaid ordinances on the subject are sufficient.

We are of the opinion, therefore, that your department is acting entirely within the scope of the authority conferred upon it in holding possession of this property at this time.

Respectfully submitted,

W. H. DEVENISH,

Assistant Corporation Counsel.

Approved:

GEO. E. CHIPMAN,

Acting Corporation Counsel.

Issuance of Hospital Licenses.

November 23, 1915.

HON. JOHN SIMAN, City Clerk, Chicago.

Dear Sir:

We are in receipt of your communication of November 13, 1915, enclosing a copy of a letter from the city collector concerning the issuance of hospital licenses, in which the following communication is quoted:

"To the City Collector:

Will you kindly issue this license subject to revocation for non-compliance with the ordinance relative to automatic sprinklers enforced by the Bureau of Fire Prevention and Public Safety, unless same is declared null and void by the Supreme Court?

The corporation counsel suggests that this be incorporated in the license.

John Dill Robertson,
Commissioner of Health."

You ask us to inform you as to your compliance with the method of procedure suggested above, "assuming that the license specifying that same is revocable at any time by the mayor, is sufficient to cover this matter."

Sections 1512 and 1513 of The Chicago Code of 1911, pertaining to the general subject of licenses, provide as follows:

"1512. MAYOR TO GRANT AND MAY REVOKE.) In all cases where licenses are required to be procured, such licenses shall be granted by the mayor, and attested by the city clerk, except where provision is expressly made for the granting of licenses by some other officer of the city. The mayor shall also have power to revoke, for cause, any license granted by him."

"1513. SUBJECT TO ORDINANCES.) All licenses shall be subject to the ordinances which may be in force at the time of issuing thereof or which may subsequently be passed by the City Council."

Section 1214, concerning the matter of hospitals, provides:

“1214. LICENSE REQUIRED.) It shall be unlawful for any person, firm, association or corporation other than the regularly constituted authorities of the United States, the State of Illinois, the County of Cook or the City of Chicago to open, conduct, manage or maintain any hospital as defined in this article within the corporate limits of the City of Chicago without first obtaining a license therefor as hereinafter provided.”

Section 1215, which defines the manner in which applications for hospital licenses shall be made, provides, among other things, that the commissioner of health shall recommend to the mayor that a license be issued, and upon the payment by the applicant of the license fee to the city collector the mayor shall issue or cause to be issued a license attested by the city clerk authorizing the applicant to open, conduct, manage or maintain for the current municipal year a hospital at the place, in the manner, and for the purpose in such application set forth.

Section 1224 also provides, among other things, that the mayor, upon the recommendation of the commissioner of health, predicated upon some violation of the law, or for other good and sufficient cause, shall revoke hospital licenses.

Where a party applies for and accepts a license under an ordinance imposing conditions and restrictions, and the license itself contains a condition that it may be revoked at the discretion of the mayor, the licensee thereby assents to the terms and conditions imposed both in the license and the ordinance under which it is issued. This view is reflected in the opinions of the court in *City of Chicago v. Malkan*, 119 Ill. App. 542, and *Malkan v. City of Chicago*, 217 Ill. 471.

Thus it follows that the issuance of a hospital license does not invest the licensee with the legal authority to exercise and enjoy the privileges conferred upon him by virtue of such license in a manner which would be in violation of any and all laws appurtenant thereto; hence, the right and duty of revocation of such licenses for cause, which is conferred and imposed upon the mayor, remains inviolate,

and the issuance of these licenses would be subject to the conditions and restrictions of the ordinances relating to the matter of hospitals.

Yours very truly,

JOHN A. COOKE,

Assistant Corporation Counsel.

Approved:

GEO. E. CHIPMAN,

Acting Corporation Counsel.

Bond of Indemnity for Obstruction of Streets.

November 23, 1915.

HON. JAMES A. KEARNS,

Chairman, Committee on Compensation.

Dear Sir:

Answering your request of the 22nd inst. for an opinion on the subject-matter of the council order introduced by Aldermen Cullerton and Pettkoske, copy of which is hereto attached, we beg to advise you as follows.

Section 2447 of The Chicago Code of 1911 reads as follows:

“2447. NO PERMITS TO BE ISSUED FOR TEARING UP OR OBSTRUCTING STREETS OR SIDEWALKS, UNLESS BOND OF INDEMNITY IS GIVEN.) No permit shall be issued to any person or corporation, permitting or allowing the obstruction of any street or sidewalk, or tearing up, removing or repairing of any street or sidewalk, or any part thereof, until the person or corporation making application for such permit shall first have executed to the city a good and sufficient bond, in an amount to be fixed by the commissioner of public works, and in no case to be less than ten thousand dollars, and with sureties to be approved by said commissioner, conditioned to indemnify, save and keep harmless the city from any and all loss, cost, damage, expense or liability of any kind whatsoever, which it, the city, may suffer, or which it may be put to, or which may be recovered from it, from or on account of the issuance of such permit, or from or on account of any act or thing done by virtue of the authority given in such permit, or for

any damage, loss or expense to any person or corporation caused by or on account of the obstruction of any such street or sidewalk, or by the tearing up, repairing or removing of such street or sidewalk, or part thereof."

In passing upon somewhat similar ordinances our Appellate and Supreme Courts have held in a number of cases—

"Special and unwarranted discrimination, or unjust or oppressive interference in particular cases, is not to be allowed. The powers vested in municipal corporations should, as far as practicable be exercised by ordinances general in their nature and impartial in their operation."

In the case of *Village of Kilbourne v. Blakley, et al.*, 184 Ill. App., the following language was used by the court in its opinion:

"All laws should be general in their operation and should bear equally upon all the inhabitants of the municipality. *City of Chicago v. Rumpff*, 45 Ill. 97; *Zanone v. Mound City*, 103 Ill. 552. An ordinance which discriminates between persons of the same class and imposes a penalty for an act done by one person and exempts another who does a like act is unreasonable and void. (Citing several cases.) * * * The powers vested in municipal corporations should, as far as practicable be exercised by ordinances general in their nature and impartial in their operation. *Dillon on Mun. Corp.*, p. 322."

The same rule has been announced several times by our courts and is now well established as the law of the state relative to the uniformity of general ordinances.

To attempt to discriminate between certain persons doing a like act, i. e., to require of one the giving of a bond of \$10,000, and of the other "equitable and suitable compensation" for the same act, would, in our opinion, be an unjust discrimination imposed upon persons of the same class, and therefore void.

Respectfully submitted,

DAVID T. ALEXANDER,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Sale of By-Products of the Garbage Reduction Plant.

November 24, 1915.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

We are in receipt of your letter of recent date, in which you inquire how the city can dispose of the by-products of the Municipal Garbage Reduction Plant without advertising.

This question has arisen because it has been suggested that better prices could be obtained if the city were in a position to take advantage of the changing markets in disposing of these commodities.

The handling of the by-products mentioned raises an entirely new question which has not, so far as we have been able to discover, been passed on by any court. There is provision in the statutes for the sale of property no longer necessary, appropriate or required for municipal purposes. Manifestly, however, the statute governing the disposition of such property was not intended to apply to the by-products of a reduction plant, which accumulate from day to day and must be immediately disposed of if they are to be of any value whatever. It cannot be said that under such circumstances, the city is in possession of property which it no longer requires, but rather that through the means of preserving the health of the community, property is being produced which is of value.

A municipal corporation has the implied power to do those things which are necessary to carry into effect the powers expressly granted. This doctrine has always been recognized by our courts. Consequently the city has power to dispose of the by-products in question and we are convinced that the courts will not require it to pursue the slow process provided for the sale of property no longer useful to it, which seems to apply to a different class of property altogether.

We are therefore of the opinion that any ordinance

which provides a reasonable method of disposing of these by-products will stand the test of validity. The present ordinance provides for the making of a contract. If it is deemed advisable to find some other method of disposing of it similar to the method pursued by the business agent of the city in the purchase of materials and supplies, a plan could probably be worked out that would be lawful. It would necessarily have to provide for placing the work in the hands of some officer who would be required to secure bids in a different manner than by advertising. We know of no statute that this would contravene, since it is only in the case of contracting for work, materials and supplies, for which the city must pay, that the limitations imposed by statute can be applied.

Our conclusion, therefore, is that if a feasible plan involving no discrimination or arbitrary discretion is devised and embodied in an ordinance, it will be held valid by the courts.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Extension of Car Line on Lake Park Avenue.

November 24, 1915.

HON. W. R. MOORHOUSE, Commissioner of Public Works.

Dear Sir:

We are in receipt of your communication of October 29th, accompanied by a letter from the city clerk transmitting a petition dated October 22, 1915, and letters submitted to the City Council by the Kenwood Residents Association concerning the matter of frontage consents in connection with a petition for the extension of street car line on Lake Park avenue from East Forty-seventh street to East Fifty-

fifth street. You ask that we advise you what steps to take in this matter.

Upon perusing said petition, we find that the following objections are made by the Kenwood Residents Association to the petition containing property frontage consents for the proposed extension of the street car line mentioned.

1. That the frontage consent of A. A. Manson, which relates to a frontage of 146 feet on Lake Park avenue should not be counted "on the ground that the consent was improperly obtained."

2. That the revocation of frontage consents filed by Abner V. Wills on or about July 12, 1915, is now in full force and effect, and a frontage of 116 feet on said avenue should therefore be deducted.

3. That the exclusion of "Blackstone Point" frontage from the computation of total required frontage for the first mile was an error and that the same should be included.

Said petition further states that if the frontage consents which are objected to, as noted above, are excluded, the frontage consent petition will be short 113.73 feet of a majority of the total property frontage in the first mile.

In answer to objection Number 1:

In said petition of the Kenwood Residents Association, T. C. Norton states as follows:

"I make the following statement of facts for the benefit of those whom they may concern:

"In conversation with Dr. A. A. Manson on or about the 17th of October, 1915, I was informed that he had received a promise from a certain individual to purchase his property on Lake Park avenue, at the junction with Dorchester avenue, of 136 feet of frontage, provided that an ordinance granting permission to the Chicago City Railway Company to lay rails and operate a street car line in Lake Park avenue from 47th street to 55th street should be passed. Dr. Manson stated further that it was his belief that this purchaser was sent to him by the Chicago City Railway Company."

In the case of *Doane v. Chicago City Railway Company*, 160 Ill. 22, it was held that the consent of the property owner obtained by purchase, to the laying of a street railway track

in a public street in front of his property, was void, on the ground that to so obtain such consent was contrary to public policy. This view was concurred in by the court in the case of *People v. Griesbach*, 211 Ill. 35.

However, Mr. Norton's statement of facts quoted above does not seem to contain any allegations that would bring the matter of the manner in which Mr. Manson's consent was obtained within the reasons for which the court declared the frontage consents void in the cases cited above, inasmuch as no allegation is made that the signing of said consent by Mr. Manson was predicated upon a promise that the railway company would purchase his property in consideration of his act. Furthermore, Mr. Norton's statement is at best of a hearsay nature and would be inadmissible and incompetent in a judicial proceeding. Therefore, in the absence of any stronger evidence to the contrary, we believe that this frontage consent was properly obtained and consider it proper to include the 146 feet frontage signed for by Mr. Manson. Mr. Manson, of course, still reserves the right to withdraw his name from said frontage consent petition, inasmuch as the City Council has not as yet passed an ordinance authorizing the construction of the proposed street car line extension.

Referring to objection number 2, will say:

The records show that the revocation of frontage consent signed by Abner V. Wills, representing a frontage of 116 feet on Lake Park avenue was filed on July 8, 1915; also that a new frontage consent affecting this property was filed on July 15, 1915, and that same was signed "Abner V. Wills, by Jos. K. Brittain, as Atty. in Fact."

"The authority of an agent to sign an improvement petition need not affirmatively appear, and the burden is upon the objectors to show that the petition is not sufficient. It is not necessary that the authority of an agent to sign such a petition should accompany the petition or appear upon the face of it."

Tibbetts v. West and South Towns Street Ry. Co.,
153 Ill. 147.

McVey v. The City of Danville, 188 Ill. 428.

We, therefore, lean to the opinion that a collateral attack by the city upon the validity of this consent would not lie. Hence, it follows that this consent must be presumed to be valid until it is shown by affirmative proof that it was executed without authority.

However, Mr. Wills is the court of last resort in the matter, and if the signing of said consent was unauthorized, he should revoke same.

Concerning objection number 3:

In our opinion of October 11, 1915, we reiterated and amplified our opinion of July 15, 1915, to the effect that no portion of the property comprising Blackstone Point is to be regarded as property coming within the purview of the law relating to property frontage consents. It therefore follows that the portion of Blackstone Point which abuts on Lake Park avenue (142.30 feet frontage) should not be included in figuring the total property frontage consents required in connection with the petition for the extension of a street car line in Lake Park avenue from East Forty-seventh street to East Fifty-fifth street.

In view of the foregoing, we are of the opinion that the frontage consents relating to the property of A. A. Manson (146 feet frontage) and of Abner V. Wills (116 feet frontage) should be regarded as valid, and further, that Blackstone Point frontage (142.30 feet) should not be included in computing the total property frontage consents required.

We return herewith the papers relating to this matter, which you referred to us.

Respectfully submitted,

JOHN A. COOKE,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTIELSON,
Corporation Counsel.

Assembly Halls in Public School Buildings.

November 24, 1915.

HON. CHARLES BOSTROM, Commissioner of Buildings.

Dear Sir:

You called attention to a letter from this department, under date of March 26, 1915, in which it is stated that assembly halls connected with schools do not come within Class IVb as defined in Section 300 of The Chicago Code of 1911, but are to be treated as coming within the provisions of Article XI of Chapter XV, said article being the one which defines the requirements for buildings of Class VIII. Your present inquiry is whether the said letter still stands as the opinion of this department.

We see no reason for taking a different view at the present time than was taken by the Law Department on the date mentioned, when said opinion was prepared by Mr. Cagney and approved by Corporation Counsel Beckwith.

Section 300 of the code states specifically that it applies to buildings "other than schools included in Class VIII." This in itself would be sufficient to take such assembly halls out of that classification, but, above and beyond anything mentioned in Section 300, we find a large number of provisions in point. Article XI which relates to such assembly halls. In Section 496, the floor levels, type of construction and seating capacity is provided for; the width of stairways is prescribed in Section 497; aisles are taken care of in Section 501; emergency exits and exit signs are required under Sections 502 and 503; and other provisions relating to such assembly halls could be pointed out which appear in this article. It cannot be assumed that these details would have been set forth under the division of the chapter on buildings relating to buildings of Class VIII unless it was intended that such assembly halls were to be treated differently than the assembly halls mentioned as coming within the classification known as Class IVb.

Our conclusion, therefore, is that assembly halls in

buildings of Class VIII cannot be regarded as Class IVb halls, but that they are controlled by the provisions in Article XI of the chapter on buildings, which relates to buildings used for school purposes.

Yours very truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

GEO. E. CHIPMAN.

Acting Corporation Counsel.

Consent of Council Required for Permit for Railroad Track.

November 26, 1915.

HON. A. W. MILLER, Superintendent of Streets.

Dear Sir:

Referring to your letter of the 23rd inst., transmitting therewith several communications regarding re-alignment of a track leading into the triangular piece of property known as Lot 15 in Green's South Branch Addition to Chicago in N. W. $\frac{1}{4}$ of Section 29-39-14, we beg to state that the original subdivision made by the owner at the time of the platting in 1856, had a reservation in said plat reading as follows:

“Reserving the right to lay down and maintain one or more railroad tracks in each of the streets laid out in said addition together with all necessary switches, turnouts and turntables.”

Loomis street originally did not run through to the river, but stopped at the northern boundary of Lumber street, and that part of Loomis street intersecting Lumber street that faces Lot 15 was vacated by an ordinance passed by the City Council of Chicago March 18, 1878.

The resubdivision of Lots 172 to 174, both inclusive, and Lots 11 to 19, both inclusive, recorded as Document No. 173954, in Book 13 on page 50, contains no reservation of a right to lay and maintain railroad tracks.

The City of Chicago does not take that part of Loomis

street running south from the original Lumber street with any burden or condition, and the right to lay railway tracks over the new part of the street can be given only by the City Council by ordinance duly passed for that purpose.

Chicago Terminal Ry. Co. v. Chicago, 220 Ill. 310.

Tudor v. The Rapid Transit Ry. Co., 154 Ill. 129.

I am mindful of the fact that this is a lumber district which gives employment to hundreds of people and, I am told, is used almost exclusively by teams and employes of this industry.

I am therefore of the opinion that you have no authority to issue a permit for the proposed track without permission of the City Council.

Yours very truly,

ANTON T. ZEMAN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Status of Prosecuting Attorney and City Attorney.

November 29, 1915.

TO THE HONORABLE THE CITY COUNCIL

OF THE CITY OF CHICAGO.

Gentlemen:

At the regular meeting of the City Council held November 22, 1915, the following orders were passed:

"ORDERED, that the corporation counsel present an opinion at the next regular meeting of the City Council stating whether or not the prosecuting attorney is an officer of the City of Chicago.

"ORDERED, that the corporation counsel present an opinion at the next regular meeting of the City Council stating whether or not the city attorney is an officer of the City of Chicago."

In the recent case of *Fergus et al v. Russel, State Treasurer et al.*, the Supreme Court, among other things, held as follows:

“It becomes necessary, then, to determine who compose the officers of the state government. This question is not left open to conjecture, as Section 24 of Article 5 of our Constitution contains the following definition: ‘An office is a public position created by the Constitution or law, continuing during the pleasure of the appointing power, or for a fixed time, with a successor elected or appointed.’ This is an explicit definition and must serve as the only guide of the legislature in making appropriations for the salaries of the officers of the state government. This definition contains two essential elements, both of which must be present in determining any given position to be an office: (1) The position must be a public one, created either by the Constitution or by law; and (2) it must be a permanent position with continuing duties. To determine whether the first element is present we have but to look to our Constitution and our statutes to see whether the particular position under consideration has been created by the Constitution or by law. An office is created by law only as a result of an act passed for that purpose. The mere appropriation by the General Assembly of money for the payment of compensation to the incumbent of a specified position does not have the effect of creating an office or of giving such incumbent the character of an officer (*People v. McCullough*, 254 Ill. 9), as an office cannot be created by an appropriation bill. To ascertain whether the second element is present it is necessary to determine the character of the position. This is not determined by the method in which the occupant or holder of the position is selected,—whether by appointment or election. If the duties of the office are continuing and it is necessary to elect or appoint a successor to the several incumbents, then the second element is present whether the incumbent be selected by appointment or by election, and whether the incumbent be appointed during the pleasure of the appointing power or be elected for a fixed term.”

Sections 85, 86 and 88 of The Chicago Code of 1911 are as follows:

“85. DEPARTMENT ESTABLISHED.) There is hereby established an executive department of the municipal government of the city which shall be known as the Department of Law and which shall embrace the cor-

poration counsel and such number of assistants and clerks as the City Council may by ordinance provide; one of such assistants shall be known as the *city attorney* and another as the *prosecuting attorney*.

“86. OFFICE CREATED.) *There is hereby created the office of corporation counsel.* He shall be appointed by the mayor by and with the advice and consent of the City Council and shall be the head of the Law Department of the city.

“88. ASSISTANTS—APPOINTMENT AND REMOVAL.) The corporation counsel shall have the power of appointing and removing all or any of his assistants and clerks.”

It has been held that where an incorporated city is invested by the legislature with power to pass ordinances, an ordinance passed by the legislative branch of the corporation, in pursuance of the act creating the corporation, and within the power conferred, has the force and effect of a law passed by the legislature, and cannot be regarded otherwise than a law of the corporation.

Mason v. Shawneetown, 77 Ill. 533.

Hope v. Alton, 214 Ill. 102.

From the foregoing, it is clear that the offices of prosecuting attorney and city attorney are public offices created by ordinance, within the scope of the powers of the City Council, which has the same force and effect within the City of Chicago as a law passed by the General Assembly.

The power of the City Council to pass such ordinance is found in Section 1 of Article V, and Section 2 of Article VI of the Cities and Villages Act. These positions also come within the second essential element laid down by the Supreme Court, in that they are permanent positions with continuing duties.

What has been said above applies equally to all assistants in the corporation counsel's office.

Respectfully submitted,

JAMES G. SKINNER,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Validity of Split Requisitions.

November 29, 1915.

HON. VIRTUS C. ROHM, Business Agent.

Dear Sir:

Your communication of November 16, 1915, addressed to the corporation counsel, asking for certain information and advice as to whether certain requisitions therein referred to are split requisitions, has been submitted to the undersigned for reply.

Whether or not these are split requisitions depends upon whether the head of the department knew at the time the first ones were made that there would be requisitions for the later ones, or by reasonably diligent inquiry could have ascertained that fact. If it was possible for the head of the department that sent in the requisitions to have looked ahead or to have obtained information that would show him that the later requisitions would be necessary, then I am of the opinion that they are split requisitions. If, however, upon the other hand, it could not have been ascertained that the subsequent requisitions would be necessary, and that they arose as matters of emergency, then I am of the opinion that they are not split requisitions.

As to your second inquiry, whether you would be violating the ordinance limiting a single purchase to less than \$500, depends upon whether or not they were split requisitions. If they were not split requisitions you would not be violating the ordinance. Otherwise I am of the opinion that you would.

As to your third question, my opinion is that had all these requisitions been under the same date and reached your office on the same day, they would be split requisitions.

As to your fourth question: What would be the opinion of this department had all these requisitions, dated separately as they are, called for deliveries to the same location, my reply is that they would be split requisitions and

would be controlled by the five hundred dollar purchase limitation.

Respectfully submitted,

JAMES G. SKINNER,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Sale of By-Products from Municipal Reduction Plant.

November 29, 1915.

HON. JOHN DILL ROBERTSON, Commissioner of Health.

Dear Sir:

Your letter of inquiry of the 4th inst., addressed to the corporation counsel, in relation to the power of the city to contract with a broker for the sale of by-products produced by the city incidental to and as a result of the operation of the Municipal Reduction Plant, has been referred to the undersigned for reply.

The city operates such reduction plant as a health measure by virtue of its police power. It is elementary that when a municipality has power to do a thing, the power so delegated necessarily carries with it such implied powers as may be reasonable or necessary for the carrying into effect of such delegated power. The city having power to operate a reduction plant, it follows that it has power to dispose of surplus products in connection with the operation of such plant.

The only question, therefore, is as to the procedure to be followed. On this point, the statutes are silent. The Cities and Villages Act contains a provision to the effect that it shall require a two-thirds vote of all the aldermen to sell any city or school property. (Art. III, Sec. 13.) There is also a later act authorizing cities to sell property when, in the opinion of three-fourths of the aldermen, such property is "no longer necessary, appropriate or required

for the use of such city," etc. (Hurd, 1913, p. 374.) Under this act it is necessary to advertise for sixty days, and other formalities are required which consume additional time.

It is plain that these provisions were not intended to apply to the sale of products of the kind mentioned, which result from the handling of garbage. Whatever property rights there existed in the garbage originally, were vested in the persons who produced it, and the city only took charge of it for the purpose of conserving the health of the people. While it is true that in disposing of the garbage it is converted into property of value, this is in the nature of salvage produced from day to day which, as a part of the general health scheme, must be disposed of from day to day or nearly so; and hence the provisions of the statute for the sale of property do not fit.

Inasmuch as the city operates such garbage reduction plant by virtue of its police power, and there is no statutory provision prescribing the method of procedure for the sale of the by-products in such case, the manner of such sale can only be governed by the action of the City Council, which, in our opinion, is free to act for the best interests of the city.

This department has heretofore rendered an opinion concerning sales of such by-products of the city. (See opinion of September 22, 1913, page 457 of Opinions of Corporation Counsel, January 1, 1913, to October 5, 1914.)

The City Council, in pursuance of that opinion, passed an ordinance authorizing the commissioner of health to make contracts for the sale of these products. This ordinance can be amended, or a new one can be passed, so that the commissioner of health may have power to contract with a broker, who in turn must be controlled by some certain fixed rule of conduct in disposing of these products on the open market or otherwise. If care is taken to avoid discrimination, and to avoid conferring so great a measure of discretion as to amount to an unlawful delegation of power, there is no reason why the product cannot be handled through a broker as you suggest.

Necessarily, the procedure must be defined by ordinance. A plan by which the broker is required to secure bids for sales, somewhat in the same manner that the city's business agent secures bids on purchases that he makes, is probably the nearest approach to a system for taking advantage of the highest market prices that the law will permit. In response to the inquiry of the Committee on Finance on the same subject, we gave an opinion along these lines very recently, and we enclose a copy of same for your convenience.

We make the further suggestion that in case the Finance Committee favors such a plan, someone who is informed as to the various products to be sold, the manner of selling and the places where the markets for same exist, should be consulted by the persons—both in the Law Department and in the Department of Health—who will plan the procedure and draft the ordinance.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Pay-Roll of Department of Boiler Inspection.

November 30, 1915.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

In your letter of recent date concerning the pay-roll of the Department for the Inspection of Steam Boilers, etc., you state that the said pay-roll for the period ending November 23, 1915, contains 28 boiler inspectors, while only nine were appropriated for in the annual appropriation bill, to which four were added by a council order passed July 15, 1915. (Printed Council Journal, page 1264.) You ask us to pass on the legality of the proposed payment of salaries for the additional men.

As to the four additional inspectors provided for by council order, we are of the opinion that they were lawfully added to the list provided for in the appropriation bill if no additional appropriation was required to take care of their salaries. As explained to you in a former opinion, we do not look upon the section of the appropriation ordinance prohibiting heads of departments from changing salary items as a limitation on the council's power to do so, and we regard it entirely within the power of the council to shift appropriations in a bureau or department as long as these remain within the general objects and purposes for which they were originally made.

It is different, however, with regard to the inspectors that were not thus provided for. We know of no provisions of the law by which more than thirteen of these inspectors can be employed at one time under the present circumstances. The appropriation ordinance makes provision for eleven boiler inspectors' helpers, and if these positions are given to persons with permission to call themselves "boiler inspectors," the persons holding the places would have the right to claim pay for their services, although even in that case they ought to appear on the pay-roll by the title given to them in the appropriation ordinance before the pay-roll can be lawfully approved.

Sections 31 and 32 of the Civil Service Law read as follows:

"COMPTROLLER TO PAY SALARIES ONLY AFTER CERTIFICATION.) § 31. No comptroller or no other auditing officer of a city which has adopted this act shall approve the payment of, or be in any manner concerned in paying any salary or wages to any person for services as an officer or employe of such city, unless such person is occupying an office or place of employment according to the provisions of law and is entitled to payment therefor.

"PAYMASTERS, ETC., TO PAY SALARIES ONLY AFTER CERTIFICATION.) § 32. No paymaster, treasurer or other officer or agent of a city which has adopted this act shall willfully pay, or be in any manner concerned in paying any person any salary or wages for services as an officer

or employe of such city, unless such person is occupying an office or place of employment according to the provisions of law and is entitled to payment therefor."

With respect to the above sections, we do not believe the comptroller or any other fiscal officer is bound to inquire into the legal standing of a person duly certified by the Civil Service Commission as the person who holds a position according to law, but such officers are bound to take notice when more than the number of positions provided for by law are on the pay-roll. Heads of departments are prohibited, by Section 3 of the appropriation ordinance of 1915, "from changing any salary or wages item herein, and from incurring any liability which will necessitate a transfer from the appropriations for salaries and wages in their respective departments."

As indicated above, if the items on the pay-roll which were not heretofore appropriated for can be paid out of the salvage of appropriations in the department, the City Council has the right to make the change. We give this as our opinion although we understand that the city treasurer does not concede the right of the City Council to make such transfers of funds as would be necessary to do this.

We therefore state as our conclusion, that without action on the part of the City Council in the matter, the payment of any greater number than thirteen inspectors would be unlawful.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

GEO. E. CHIPMAN,
Acting Corporation Counsel.

Liability of City for Damages to Automobile.

December 1, 1915.

L. E. GOSSELIN, Esq., Deputy Comptroller.

Dear Sir :

Your letter of December 1, 1915, addressed to the corporation counsel, has been referred to me for consideration.

In said letter you say that on March 3, 1915, voucher No. 66087 for the sum of \$100.79, in favor of Samuel J. Cohen was forwarded to the comptroller's office by the Police Department for payment. You say also that this was in payment of a claim for damages to the automobile of Mrs. Cohen which came into collision with a car of the first deputy superintendent of police. You also state that on April 17, 1915, a legal opinion was written by Mr. Edward J. Queeny, Assistant Corporation Counsel, approved by John W. Beckwith, Corporation Counsel, relative to this claim, and forwarded to Chief of Police Gleason, in which it was held that before payment of this claim was made by the comptroller an order directing its payment should be passed by the City Council. You also say that on this date you were shown a letter addressed to the chief of police relative to the same claim written by myself and approved by the corporation counsel, in which it is held that releases of all parties affected by the accident having been filed, it is now proper to pay aforesaid claim.

When I wrote this last letter my only duty was to see that proper releases were drawn up for the occupants of the demolished automobile to sign, releasing the police officers who were in the city's machine which caused the damage. This was all I did, and that was the reason why I recommended the payment, if I did recommend such a payment.

Before the opinion of Mr. Queeny, and before several opinions of this office were written within the last year, it had been the custom of the Police Department to pay just claims of this kind, if it is a just claim, out of what is known as the "Chief's Special Fund," but the chief asked for an opinion as to whether such payment should be made, and this office had to say and must always say that in cases of this kind the City of Chicago is not liable for such damages; and if it is paid, the only person having authority to do so would be the chief of police, upon an order of the City Council. But even then, the City Council cannot go back of the law, and when such an order is introduced in the City Council, it is always referred to the Finance Committee, which refers it to this office for an opinion. This office must always render an opinion stating that the City of Chicago is not liable.

In the face of such an opinion, the City Council will not authorize the payment of money of this kind, and the official who pays the money might be held liable on his bond. I see no remedy for this except by an act of the Legislature. In the case of Mr. Cohen, we will say as we have said before, that the City of Chicago is not liable for the payment of the damages sustained to his automobile.

Respectfully submitted,

A. L. GETTYS,
Assistant Corporation Counsel.

Approved:

GEO. E. CHIPMAN,
Acting Corporation Counsel.

**Sale of Lots Through Distribution of Coupons at Moving
Picture Theaters.**

December 4, 1915.

HON. C. C. HEALEY, General Superintendent of Police.

Dear Sir:

You submitted to this department the complaint of F. W. Hack, 3264 Cottage Grove avenue, concerning the distribution of coupons at moving picture theaters purporting to be good for a free lot in Northern Michigan. The parties who are operating in this way call themselves the "Arbutus Park Association." Attached to the letter of inquiry and complaint are the report of the chief of detectives, a number of exhibits, copies of letters, etc., from which all the details set forth herein are gathered. The two questions asked by you are, first, whether the distribution of the coupons at moving picture shows is contrary to law or violates any provision of the code under which the amusement license for the show was secured, and second, whether the method of operation constitutes a confidence game.

It appears from the data at hand that the parties who are operating the scheme for the "giving away" of lots purchased 600 lots in Traverse County, Michigan, for \$321 and have also secured an option on 45,000 more. The lots cost these parties $53\frac{1}{2}$ cents each according to these figures, There are no improvements of any kind on the property, and (judging from the fact that a part of the expense for which each recipient of a "gift" is asked to pay is for surveying and marking out of streets) the property is not even subdivided.

In order to sell the lots an announcement is made, verbally and by throwing same on the screen, at moving picture theaters, that a certain number of lots will be given

away to parties who will write their names and addresses on a coupon that is distributed to all seat-holders and deposit such coupon in a box in the lobby of the theater. The coupons contain words to the effect that lots will be given away free, and they are numbered. The numbering is apparently done for the purpose of creating the impression that there is a drawing connected with the distribution of the lots. No other reason for such numbering suggests itself to us, for every one who drops the coupon in the box is regarded as a prospect and has an equal opportunity of acquiring a lot. There is no chance connected with the plan, but to make the patron believe he is participating in a game of chance when he is not, is just as unlawful as to operate such a game.

Every person who drops the coupon with his name and address on same into the box receives a notice drawn up in such a way as to indicate that he must hurry in order to take advantage of the opportunity to receive a lot "free." It is headed "Time limit ticket," admonishes the party that he should bring the notice and "call today * * * concerning your deed to lot given away," and warns him that "*we will hold same for you not later than 8:30 p. m.—which is the time limit, otherwise your ticket will be canceled.*" It also promises that there will be "no obligation, no expense except small fee for legal papers."

When the party appears in response to such notice he is informed that the lots are being given away for advertising purposes, but is still required to pay a sum down and an additional sum on receipt of deed, making a total of \$6.75. Besides this there is an additional charge for recording.

The "Arbutus Park Association," or the persons who are doing business under that name, appear to be the owners of the property which they are disposing of in this way, and claim that they do actually convey a good title to a lot to the purchaser. If that is the case the only objectionable features about this way of doing business are

the representation that they are giving away something and the intimation that the lucky holder of the coupon will be selected by chance.

Whether or not this amounts to a confidence game or lays them open to criminal prosecution for obtaining money under false pretenses is a close question. The deed which they give is presumably genuine and neither the ticket nor the notice comes within the legal definition of a false token. To constitute the crime of obtaining money or other property by false pretense the following must be shown:

- (1) false pretense,
 - (2) by the defendant or some one instigated by him,
 - (3) knowledge of the defendant of its falsity,
 - (4) a reliance on the pretense of the person defrauded,
 - (5) an obtaining of the money or property by the defendant,
 - (6) an intent on the part of the defendant to defraud,
 - (7) an actual defrauding.
- 19 Cyc. 393.

The false pretense in the present instance is the representation that the lots are being given away when they are in fact being sold. It might be difficult to establish that a person who bought a lot parted with his money because he relied on this pretense.

We are of the opinion that the circumstances warrant police surveillance and regulation even if a criminal prosecution might fail. The police power of the city with respect to moving picture theaters is sufficient to authorize you to serve notice that the objectionable features above mentioned should be cut out of the method of selling employed if the moving picture houses are to be the vehicles for trading. Not only should there be no element of chance, but everything that tends to persuade people that they are to partici-

pate in a chance drawing should be eliminated. All reference to a free distribution or gift should also be taken out of the announcements made and the literature used.

If these parties are willing to do this we see no reason why they may not use theaters for distributing their advertising matter and making their announcements, nor do we believe it would be contrary to law under such circumstances for them to make large profits on their land. The law permits considerable latitude for "puffing," and is not concerned with the percentage of profit, so that when the false pretense is wiped out the law cannot be invoked to protect any one from the folly of his own investments.

While, therefore, it is difficult to answer your two questions categorically, we would say:

1. The manner of distributing the coupons at moving picture shows is highly objectionable even if it is doubtful whether the law is violated, and it is within your power to compel a modification of same.

2. The method of operation could be regarded as a violation of the statutes relating to obtaining money under false pretenses if it could be shown that the one doubtful element—the reliance on the pretenses—existed and was susceptible of proof.

We return herewith the letters, exhibits, etc., mentioned above.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTTELSON,
Corporation Counsel.

Obstruction of Sidewalks in Shipment of Goods.

December 4, 1915.

HON. CHARLES C. HEALEY, General Superintendent of Police.
Dear Sir:

In your letter of recent date, you make inquiry in regard to a permanent injunction granted John Tolman & Company, Lake street and Michigan avenue, restraining the City of Chicago and its officers from interfering with them in the shipment of their goods, and ask to be advised as to what action the city may take to eliminate such nuisance caused by the above firm in obstructing the sidewalk contiguous to its place of business. It is claimed that they monopolize the sidewalk, making use of certain obstructions, so that pedestrians cannot pass along the free and unobstructed sidewalk but must walk about in the street. We, therefore, wish to make reply as follows:

John Tolman & Company filed its bill in the Superior Court of Cook County, the object of which was to restrain the City of Chicago, its superintendent of streets and commissioner of public works, from interfering with them in the receipt or shipment of goods, wares and merchandise to and from its building at Lake street and Michigan avenue, or from interfering with or preventing the necessary and reasonable use of any mechanical means or appliances for the delivery of merchandise to and from said premises across the sidewalk contiguous thereto, or from preventing teams, carts, drays or other conveyances from occupying the streets contiguous to said premises while necessarily engaged in delivering or receiving merchandise to and from said premises. The hearing was had upon the bill, answer and agreed statement of facts, and the bill was dismissed for want of equity. The Appellate Court affirmed the decree of the Superior Court. An appeal was taken from the judgment of the Appellate Court affirming the decree of the Superior Court. The judgment of the Appellate Court and

the decree of the Superior Court were reversed and the cause remanded to the lower court with directions to enter a decree enjoining the appellee (city) from preventing or interfering with the reasonable and necessary use by the appellant of skids in the delivery of merchandise to and from the premises in question across and over the sidewalk contiguous thereto.

Tolman & Co. v. City of Chicago, 240 Ill. 268.

The relief asked for in the petition by the appellant was not the establishment of the right to use skids, but the prevention of interference with their reasonable use. They did not contend to have the right to maintain platforms in front of their shipping doors, acknowledging the same to be unlawful, but alleged that the temporary use of the sidewalk for the delivery of goods to and from its building was a legitimate use of the street and was not inconsistent with the use of the public so long as such use by them was reasonable.

Our Supreme Court in passing upon the question said:

“It is clear that appellant may rightfully use the skids to some extent. Their use is not, of itself, unlawful or a nuisance, but is lawful if the manner or extent of that use, the place in which it is exercised, or the conditions surrounding it are such as not to make it unlawful by reason of its being unreasonable. That is a question to be determined in a judicial proceeding.”

In this connection, as we understand it, the obstructions or skids so used are entirely necessary and cannot be dispensed with. However, the City of Chicago, in the exercise of its general control over the streets, has a right to regulate the use of skids and may fix the time and place and conditions and circumstances thereof, but its executive officers have no authority to interfere with any person in conducting his business except in the enforcement of an ordinance or in pursuance of judicial process.

We wish to bring to your notice Section 2289 of The Chicago Code of 1911, which provides as follows:

“No part of any sidewalk or sidewalk space shall

be taken for private use by lowering or cutting down the same next to the building or railing off the same by any wooden or iron railing or by shutting off the public from passing along and over the same, and said sidewalk shall not be raised up next to the building by constructing a platform or platforms on the same of either wood, iron or stone, but said sidewalk shall be built flush up to the building on a uniform grade as herein provided.”

We must concede, in view of the decision rendered by the Supreme Court in the Tolman case, that one may reasonably obstruct the walk, if it be necessary for the transaction of business, and if it does not unreasonably interfere with the rights of the public, so that such use thereof does not become a public nuisance. In the event, however, that there be a permanent obstruction in the street or upon the sidewalk, it constitutes a purpresture and is unlawful.

We, therefore, conclude, and are of the opinion, that if there be an obstruction in the nature of a permanent platform projecting in front of the shipping doors and upon the sidewalk, contrary to Section 2289 of The Chicago Code of 1911, the city, through its proper officers, to wit, the superintendent of streets and commissioner of public works, has the right to order the immediate removal of the same. And upon either a refusal or failure of the party or parties so informed to take such action, the city may proceed in such manner as it shall deem necessary to obliterate such existing nuisance.

Yours very truly,

H. L. BRIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Difference Between a Public and Private Garage.

December 6, 1915.

HON. CHARLES BOSTROM, Commissioner of Buildings, Chicago,
Illinois.

Dear Sir:

Several days ago there was submitted to the writer a set of blue prints, together with a plat and a memorandum concerning the proposed garage to be erected at the south-east corner of Dorchester avenue and 64th street. No request for an opinion accompanied these papers, and there was nothing to indicate what advice any one in the building department required on the subject. In fact, the memorandum above referred to seemed to be conclusive on the point that an investigation had been made and that it had been determined that frontage consents would be required.

Mr. John H. Haskell, who stated that he represented Mr. Oscar Ecklund, the builder, said that what was wanted was an opinion as to whether this was a public or a private garage, in order to determine whether or not frontage consents would be required.

There is some misunderstanding as to the definitions "public garage" and "private garage" which appear in the fire prevention ordinance, and we respectfully refer you to an opinion rendered by the Law Department on February 28, 1913, and appearing in the volume of opinions covering that date on page 150 thereof. So far as the necessity of frontage consents is concerned, that is determined entirely by Section 2683 of The Chicago Code of 1911, which reads as follows:

"2683. GARAGE DEFINED.) The word 'garage' as used in this article shall be held to mean, and is hereby defined as meaning, any barn, stable, building or other place within the city where automobiles, autocars or any similar self-propelled vehicles are kept or let for hire or reward to any person, whether such vehicle be so hired out or let with or without an operator for same, or where such vehicles are kept ready for use and where rent is paid to the keeper thereof for such keeping."

It will be seen, from a reading of this section, that the definition of the word "garage" cannot be extended to such a building when it is used exclusively for the purpose of the owner. It is this point that has given rise to the doubt in the present instance. Mr. Haskell declares that the proposed garage is intended for the use of the owner only, that no other machines besides those owned by him and used by him in his business will be stored there, and that such machines will not be used for hire or reward, but simply in the regular course of business.

Such being the case, we have nothing whatever to do with the blue prints, plat, method of construction, or anything connected with the proposed building, so far as frontage consents are involved. No frontage consents would be required if the statements of Mr. Haskell are correct, and you are satisfied that the building is to be used for that purpose only.

As stated above, we have nothing before us which amounts to a verification of the verbal statement of the agent of the owner, and while we take it for granted that this is true, we believe that at least a written statement ought to be presented to you before you issue a permit on the theory that the building in question will not be one that comes within the definition of the word "garage" as used in Section 2683.

We return herewith the papers above referred to, with the conclusion that in case you can verify the statement that this is to be used exclusively for the purposes of the owner in his private business, and no machines are to be rented for hire by him, he has the right to erect the structure proposed without securing frontage consents.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Right of City to Build House of Shelter.

December 6, 1915.

SAMUEL P. THRASHER, Esq., Superintendent, Committee of Fifteen.

Dear Sir:

In your letter of recent date you ask whether the city, under the law, can build a house of shelter apart from the bridewell. We understand this question relates to the physical structure, and not to the management of the institution. It is, of course, understood that the house of shelter is controlled and under the management of the board of inspectors of the house of correction, and that the matron and teachers for the house of shelter must be appointed by the superintendent of the house of correction, by and with the advice of the board of inspectors.

As long as this control of the institution is retained, we see no reason why the house of shelter could not be built at some other place than the main structure of the house of correction. There is only one section of the statute relating to houses of correction that provides for a house of shelter. It is quite clear that it was the intention of the Legislature that such an institution could be run either as a department of the house of correction in the same building or in a separate building. Hence, since the building may be entirely separate and distinct, it cannot be assumed that it must be within any fixed distance or appurtenant to the main building of the house of correction. In this respect, it is unlike an annex to a jail or prison. It might be argued, in fact, that the advantages to be derived by having a house of shelter in a separate structure would be increased if such structure were entirely removed from the influences which necessarily prevail in the neighborhood of a house of correction.

We know of no reason, therefore, why such house of shelter should not be built anywhere within the city, as well as on the grounds of the house of correction, unless it is a

question of expediency or administration, which may possibly make it undesirable to have the house of shelter any great distance from the house of correction.

We do not understand your question to relate to any site outside of the city limits. The Act of 1897 authorizes cities to establish houses of correction outside of the corporate limits within three miles of the city, the same not to exceed 40 acres in extent.

There may be some doubt whether a part of the institution could be located on such a tract outside of the city while the main institution remains within the city, but we are informed that you are not interested in that phase of the question at present.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTTELSON,
Corporation Counsel.

Assignment of Fire Lieutenants to Bureau of Fire Prevention and Public Safety.

December 6, 1915.

HON. OSCAR DE PRIEST, Alderman, 2nd Ward.

Dear Sir:

We have your letter of the 3d inst., requesting the corporation counsel to draw an ordinance increasing the lieutenants of the Chicago Fire Department by thirty-five, said lieutenants to be assigned to the Bureau of Fire Prevention and Public Safety, the salary to be paid to them to be the same as they receive now.

Section (§), Chapter 24, Hurd's Revised Statutes of 1913, under an act entitled "An Act to regulate the civil service of cities," said section being Section 4 of that act, reads as follows:

“Said commission shall make rules to carry out the purpose of this act and for examinations, appointments and removals in accordance with its provisions, and the commission may, from time to time make changes in the original rules.”

The foregoing provision of the statute conferred upon the Civil Service Commission of the City of Chicago the power and authority to pass the rules referred to in the above section.

In accordance with such power and authority conferred upon it, the civil service board passed and adopted Section 4 of Rule III, which appears on page 64 of the 1914 report of the Civil Service Commission. Said rule is as follows:

“Sec. 4. EXPIRATION OF LISTS.) Eligible lists shall expire by limitation of time in two years and one day from date of posting thereof, unless the commission before the expiration of such time on any list shall order otherwise.”

I presume the purpose of your ordinance is to keep the present thirty-five firemen and pipemen who are now at the head of the eligible list in their present assignments to the fire prevention and public safety bureau.

The rule of the Civil Service Commission, as well as the rule in the fire marshal's office, has been and is that the thirty-five men heading the lieutenants' eligible list shall be assigned to duty in the Bureau of Fire Prevention and Public Safety. The men assigned to such duty are assigned by the fire marshal and it is discretionary with him as to whom he shall assign.

After the old eligible list has expired, and in accordance with the rule of the Civil Service Commission, a new examination will have to take place and a new eligible list posted, and from that eligible list the first thirty-five men will be assigned to the bureau.

If it is your desire to arrange it in some manner so as to keep the present thirty-five men now assigned to the bureau in their present positions, there is no way that we can see whereby an ordinance can be drafted that would not be in conflict with the civil service rules.

However, the fire marshal may create a new title to apply to these thirty-five men assigned to the bureau, but they would still be subject to Section 4 of Rule III. The only other method to proceed is to create a new office entirely, and after an ordinance to that effect has been passed, then the Civil Service Commission will hold an examination for that office. There is, however, some danger in doing that at the present time, unless the present civil service rule of promotion to lieutenant is amended. As it is now, those entitled to promotion, by a competitive examination, to lieutenant must come from the ranks of pipemen, truckmen or drivers who have served a full term of three years in the department. There is no provision for any intermediary employes, such as you would attempt to make if an ordinance was introduced creating such new position. The danger in doing so would be that you might put these thirty-five men in a position where they could take no examination for lieutenant.

I shall be glad at any time to take this matter up more in detail with you.

Very truly yours,
DAVID T. ALEXANDER,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Salary Increases After Passage of Annual Appropriation Bill.

December 7, 1915.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

You submitted for interpretation an ordinance passed by the City Council at the meeting of December 6, 1915, which was in words and figures as follows:

“Sec. 1. That the scale of wages heretofore fixed in

ordinances passed by this council subsequent to March 31, 1915, and making appropriations, which appropriations were illegal, shall be the scale of wages to be paid by the various departments of the city government during the year 1915.

"Sec. 2. This ordinance shall be in force and effect from and after its passage."

The question that you ask is, whether this ordinance is sufficient to justify you in approving the payrolls which contain increases in the wages of employes over and above those fixed in the annual appropriation ordinance, and also to what extent, if any, this would apply.

We assume that the council took this means of correcting a situation that has arisen by reason of the fact that the increase in wages in almost every instance since March 31, 1915, was made through the means of an appropriation ordinance.

So far as these ordinances are concerned, where they make increased appropriations from the corporate fund, they have been held invalid in the recent Sergel case, and, therefore, it was necessary for the City Council, in case it wished to have the increased wages paid, to pass an ordinance authorizing such increased pay, the same to be payable out of salvage in the department or to be provided for by means of a transfer of funds. This is undoubtedly the intention of the City Council and can be so understood, although the ordinance quoted above is inartificially drawn and would have been subject to less misunderstanding if the different positions had been named and the increased salaries specifically set forth, and the statement made concerning each as to where the additional funds were to be obtained from. We do not think, however, that the omission of these details necessarily renders the ordinance invalid or subject to misconstruction.

The only other question involved is what was intended by the words "scale of wages." While in most instances the words "salary" and "wages" are held to be synonymous and interchangeable, nevertheless, in view of the fact that

this ordinance is not as specific as it might be, and speaks of a "scale," a word that is ordinarily applied to the wages of laborers, mechanics, etc., who have some fixed compensation for the amount of time that they actually work, and the same is not usually applied to the salary of an employe or official working for the public, who is paid a monthly stipend, therefore, we believe that the safer course for you to pursue in the present instance is to regard the words "scale of wages" as referring to the wages of laborers, mechanics and artisans which were changed by ordinance since March 31, 1915.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTTELSON,
Corporation Counsel.

Liability of City for Damage Caused by Bursting of Water Main.

December 8, 1915.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

Replying to your request for an opinion as to the liability of the city with reference to the claim for damages of Leo Kipkowski, caused by the bursting of a water main on Paulina street about 200 feet north of Milwaukee avenue, on January 29, 1915, would state that we have caused an investigation of this matter to be made, and wish to report as follows:

On the night of January 29, 1915, there was a break or leak in the water main on Paulina street which caused an overflow of water into the basement of 1341 North Paulina street. We are informed that the overflow was caused by the inability of the employes of the water department to locate a defective or leaky tap.

The owning of water works, and the furnishing of water by a municipal corporation to its inhabitants for profit, is an undertaking of a purely private nature. The duties exacted by a municipality under such circumstances are the same and the liabilities imposed upon it are the same as those imposed in the case of a private corporation or individual engaged in a similar enterprise. They are bound to exercise due care and skill in constructing and maintaining mains for the distribution of water, but they are not insurers of the safe condition of property, and, consequently, are not liable for injuries that could not have been prevented by the exercise of due care and vigilance. The negligence in such cases might be said to be the omission to do that which should have been done by those who because of their experience and knowledge were entrusted with such responsibility, or the doing of something by them which should not be done, being contrary to reasonableness or the usual customary and ordinary manner of doing it.

In the case of *Selz, Schwab & Co. v. City of Chicago*, 202 Ill. 545, the court, at p. 549, said:

“There were no facts stated from which the law would imply a duty of inspecting the pipes laid deep in the earth below the streets, or any facts showing for what reason an inspection would or could be necessary. Judging from the facts stated in the count, an inspection of mains and pipes under the streets would be impossible, and if there were any facts showing the necessity or propriety of such an inspection they should have been alleged.”

A careful search of the authorities discloses no opinion conflicting with the doctrine announced in the above case, and as no negligence may be imputed on the part of the city or its employes in the original construction of the main and there was no negligence on its part in its maintenance in making the repairs or otherwise, we are of the opinion that the city is not liable.

We are enclosing a copy of the report of our investigation, also bills furnished us by Mr. Kipkowski which he

claims he paid for the work done, that was rendered necessary by the damage to his property.

Very truly yours,

H. L. BRIN,

Assistant Corporation Counsel.

Approved:

GEORGE E. CHIPMAN,

Acting Corporation Counsel.

Revocation of Frontage Consent.

December 9, 1915.

JOHN D. RILEY, Esq., Superintendent of Maps.

Dear Sir:

We are in receipt of your communication of November 27th, transmitting a letter from the city clerk, to which is attached a document signed by William L. Robinson purporting to revoke frontage consent which was executed by Clarence A. and Walter E. Christ in connection with frontage consent petition for the proposed extension of street railway in Lake Park avenue from 47th street to 55th street. You state that this property, at the time said frontage consent was given, was owned by said Clarence A. and Walter E. Christ, and that subsequently it was conveyed to Mr. William L. Robinson. Further, that Mr. Robinson now seeks to revoke this frontage consent, and you ask to be advised whether or not this revocation should be allowed.

In the case of *Littell v. Board of Supervisors*, 198 Ill. 205, the court, at page 208, stated as follows:

“Our examination of the decisions cited by counsel on either side from other courts on analogous statutes has led us to the conclusion that the act of signing such petitions is not an irrevocable act, and that it may be revoked at any time before the jurisdiction of the body authorized to act has been determined by it.”

Similar reasoning is adopted in the following cases:

Kinsloe v. Pogue, 213 Ill. 302.

Boston v. Kickapoo Drainage District, 244 Ill. 577.

Mack v. Polecat Drainage District, 216 Ill. 56.

It is an elementary proposition of law that a purchaser of property stands in a like position with regard to the same as did the seller of the property, and that he succeeds to all such rights in connection with this property as were vested in the seller. It is our information that the street car extension ordinance, for which this and other frontage consents were obtained, has not as yet been acted upon by the City Council; and therefore, in view of the various decisions cited above, the persons who signed such frontage consents are still vested with the right of revocation of same under the law.

We are therefore of the opinion that William L. Robinson, whom you advise us purchased the property for which the frontage consent in question was given from Clarence A. and Walter E. Christ, succeeds to all rights and powers with regard to said frontage consent which the Christs would be vested with if they still retained ownership of the property; and this being the case we advise you that it is proper for you to accept the revocation of frontage consent which Mr. Robinson has filed, and to deduct the amount of property frontage represented thereby from the total property frontage consents.

We are returning herewith city clerk's communication and revocation petition attached thereto.

Very truly yours,

JOHN A. COOKE,
Assistant Corporation Counsel.

Approved:

GEO. E. CHIPMAN,
Acting Corporation Counsel.

Status of Gum Vending Machine as a Gambling Implement.

December 10, 1915.

HON. CHARLES C. HEALEY, General Superintendent of Police.

Dear Sir:

We have your letter dated December 7th, referring to the opinion rendered by this department on July 15th last relative to gum vending machines, and stating that the operation of these machines has been observed and that it is found that they are not generally used for the sole or primary purpose of obtaining gum, but that they are operated successively for the purpose of securing the trade checks which may be obtained through the mechanical operation of the machine. You ask to be advised whether or not these machines when so used may be classed as gambling devices.

We understand that these machines are in appearance and general design about the same as the ordinary slot machine used for gambling; that when the machines are operated by the placing of a nickel in the slot and pulling a lever, the operator will receive a package of chewing gum worth five cents, and in addition thereto, from time to time, from one to twenty trade checks, each entitling the holder to five cents in trade; and that before the machine is operated the indicator points to a figure showing the number of trade checks, if any, which will be received. It will be perceived that these machines possess two features which are not found in the more common form of slot machine: 1. The operator in each case receives the value of his nickel in gum although he may receive trade checks in addition; and 2. He knows before operating the machine whether he will receive trade checks in addition to the gum, and, if so, how many.

The Chicago Code of 1911, Section 984, reads as follows:

"No person shall keep, own, operate, use or cause to be kept, operated or used, in any room, saloon, inn, tavern, shed, booth, building, inclosure, or upon any premises or any part thereof, any clock, 'joker,' tape or slot machine or other device of any kind or nature what-

soever, upon, in or by or through which money is staked or hazarded or into which money is paid or played upon chance or upon the result of the action of such clock, 'joker,' tape, or slot machine or other device, money or other valuable thing is staked, bet, hazarded, won or lost. Any person violating any of the provisions of this section shall be fined not less than twenty-five dollars nor more than two hundred dollars for each offense, and each and every day on which any person shall operate, keep, own, or have in his charge, possession or control any such clock, 'joker,' tape or slot machine, or other device in violation of the provisions of this section, shall be deemed a separate and distinct offense."

You will note that the ordinance above quoted applies to any slot machine or other device upon the result of the action of which "money or other valuable thing is staked, bet, hazarded, won or lost." From a careful consideration of this ordinance and of the authorities in reference to gambling and gambling devices, we are of the opinion that when the machines in question are successively operated, as stated in your letter, with a view to winning by the operation of the machine, trade checks which will entitle the operator to the amount of trade or merchandise represented by the number of checks so obtained, the operation constitutes gambling and the machines so used are gambling devices. It is readily apparent that when the machines are used as above stated, money is staked upon the operation of the machine and that money or other valuable thing may be, and often is, won by the operator. To the extent that the operator wins, moreover, the proprietor loses. The machines thus come within the express terms of the ordinance.

The conclusion which we have reached is supported by the authorities. It has been clearly established that the fact that machines of the general nature of those in question are so constituted that the operator must in every instance receive the value of his nickel in merchandise will not relieve them of their objectionable character if they may in fact be played for the purpose of winning money or other valuable thing.

In *Lang v. Marwin*, 99 Me. 486, the court said:

“In the case before us it is idle to assume, or concede, that the person putting his five cents into the machine may be doing so merely as a means or mode of buying a five-cent cigar. It is idle to deny that the impelling motive is the hope of getting other cigars for nothing. If the machine did not afford that chance it would not be used. True, the cigar dealer sets up the machine to increase his trade and is recouped by that increase for any losses, so that in the end he loses nothing, but he does so by arousing and stimulating the gambling propensity, the very propensity the legislature evidently seeks to repress. The element of chance is the soul of the transaction. The operator hopes by chance to get something for nothing. The dealer hopes chance will save him from giving something for nothing. Each is pecuniarily interested adversely to the other in a result to be determined solely by chance. To use the language of the street ‘it is gamble’ which will win, and we have no doubt the transaction is ‘gambling’ in the statutory sense of the word.”

In the case of *In re Cullinan*, 99 N. Y. Sup. 1097, the court said:

“The chief element of gambling is the chance or uncertainty of the hazard. The chance may be in winning at all, or in the amount to be won or lost. In using the present machine we may assume that the player cannot lose. By far the greater majority of the checks called in trade for the precise sum deposited in the slot. If every ticket represented five cents, the machine would not be patronized. The bait or inducement is that the player may get one of the checks for a sum in excess of the nickel he ventures, and that is the vice of the scheme. If he wins more than he pays, the proprietor must lose on that discharge of the ticket. To constitute gambling it is not important who may be the loser.
* * *

To the same effect are:

Lytle v. State, 100 S. W. 1160 (Tex.).

Meyer v. State, 112 Ga. 20.

The machines in question have the further feature previously mentioned that the operator knows before each op-

eration just what he will receive. This, however, is nothing more than an ingenious device to conceal the real character of the machines. The distinction between these machines and the more common form of slot machine, which has been universally condemned, is that while in the latter, if the person playing the machine is successful, the nickels, or other valuable thing, drop into a pocket forthwith, in these machines on the other hand success is achieved if after the machine is operated the indicator points to a figure showing that the operator will be entitled to four, six or other number of trade checks upon the following play. The fact that the insertion of another nickel is necessary before he obtains the fruits of his success cannot operate to relieve the contrivance of its true character as a gaming device. The operator, it is true, knows that when the indicator points to gum and he operates the machine, he will on that play get gum and nothing else, but it is clearly apparent that the device will lend itself to the practice of "staking" money on a chance of winning through successive plays trade checks having a money equivalent in excess of the amount used in operating the machine, and since you state that this is in fact the use to which the machines are generally put, it follows that they are gambling devices.

You further ask whether machines which are found to be used for gambling purposes should be destroyed, or whether they should be confiscated and held pending a court action. The Chicago Code of 1911, Section 983, provides as follows:

"It is hereby made the duty of every member of the department of police to seize any table, wheel, instruments, device, or thing used for the purpose of gambling or gambling for money or other valuable thing; and all such tables, instruments, devices or things when seized shall be destroyed.

"Any person obstructing or resisting any member of the police department in the performance of any act authorized in this section shall be fined not less than twenty-five dollars nor more than fifty dollars for each offense."

Under this section the police have full authority to summarily seize and destroy devices known to be used for gambling purposes.

Our conclusions, therefore, are:

1. The gum vending machines in question are adapted to use for gambling purposes and when operated successively for the purpose of winning trade checks, as stated in your letter, they fall within the classification of gambling devices.

2. In any case where it is observed that the machines are put to the unlawful use stated above, they are within the terms of the prohibitory ordinances of the city and may be summarily seized and destroyed.

Yours very truly,

RALPH G. CRANDALL,
Assistant Corporation Counsel.

Approved:

GEORGE E. CHIPMAN,
Acting Corporation Counsel.

Analysis of the Park Consolidation Act.

December 10, 1915.

HON. WM. HALE THOMPSON, Mayor, City of Chicago.

Dear Sir:

We respectfully submit the following concerning an act passed by the General Assembly at its last regular session entitled, "An Act to consolidate in the government of the City of Chicago the powers and functions now vested in local governments and authorities within the territory in said city and to make provisions concerning the same."

Realizing as we do that great demands are made upon your time, we shall not attempt to quote said act in its entirety, as it is of considerable length, but will endeavor to point out the general and important features of same.

Under the provisions of this act all powers and func-

tions not specifically abrogated by this act which are now vested in the city, or in any town, township, park, park district or other local government and authority having jurisdiction confined to or within the territory of the City of Chicago or any part thereof, shall be vested and consolidated in the municipal government of the City of Chicago, except that towns or townships shall be deemed to continue in existence only in so far as their continued existence may be necessary to the collection of taxes. The City of Chicago is to become vested with all their property and corporate rights and powers and to be subject to all their lawful debts, obligations and liabilities. Any future annexation of territory to Chicago is to be amenable to the same provisions and conditions.

OFFICERS AND EMPLOYEES.

The offices of all officers of all towns or townships, parks or park districts, or other local governments consolidated, are abolished, except as otherwise expressly provided. All officers and employes *subject to the civil service laws* relating to any of such local governments, and all officers and employes (excepting all elective officers, general superintendents, attorneys and secretaries) employed by local governments *not under civil service law* who have served for at least six months prior to the passage of this act and who would, if employes of the City of Chicago, be included in and subject to the civil service laws relating to said city, shall be transferred to, and without examination shall become, officers and employes of the City of Chicago, subject to the provisions of the civil service laws relating to said city, and the Civil Service Commission of the City of Chicago, upon the taking effect of this act, shall classify and place, in accordance with the character of his former duties, rank and responsibilities, each of said officers and employes in his appropriate class and grade in the classified civil service of said city.

MUNICIPAL EMPLOYEES PENSION FUND.

All employes, except policemen, transferred to the City of Chicago, who would, if employes of said city, be included within the provisions of the Pension Fund Act of 1911, as amended, shall have credit thereunder, in respect of time of service, for the time theretofore served, and shall become subject to all the provisions of said Pension Fund Act.

POLICE PENSION FUND.

All policemen so transferred to the City of Chicago and all persons who were formerly employed as policemen in any of the local governments consolidated and who are now employed as policemen by the City of Chicago, shall have credit in respect of time of service, under the Police Pension Fund Act of 1887, as amended, and under any act of like nature superseding said act and applying to the City of Chicago, for the time theretofore at any time served by them as policemen of the local governments consolidated.

REVENUE.

The City Council shall annually, during the first half of the fiscal year, by ordinance, levy a general tax on real and personal property not exempt from taxation for corporate purposes, including general city, park, library, and house of correction purposes, to meet the requirements of the annual appropriation bill for such year, not exceeding in the aggregate, exclusive of the amount levied for the payments of bonded indebtedness and the interest on bonded indebtedness, one and six-tenths per centum of the assessed value of the taxable property within the city, as assessed and equalized according to law for municipal purposes.* In case the aggregate amounts levied, exclusive of the amounts levied for the payments of bonded indebtedness and the interest on bonded indebtedness, shall exceed, as to the cor-

*This rate has since been changed.—Ed.

porate purposes tax, the prescribed limitation, such excesses shall be disregarded, and the residue only treated as certified for extension. In such case all items for corporate purposes in such tax levy, except those for payments of bonded indebtedness and the interest on bonded indebtedness, shall be reduced pro rata.

DEPARTMENTS, BUREAUS, ETC. TO MAKE FINANCIAL REPORTS TO CITY COUNCIL.

The several departments, bureaus, officers, boards, commissions and other institutions for the support and maintenance of which moneys are appropriated by the City Council shall transmit to the City Council, when directed by it, statements of their receipts, expenditures and operations, and shall severally prepare for submission to the City Council, before the passage of the annual appropriation bill, an estimate in writing of the amount of expenditures required for their respective departments.

COUNCIL MAY CREATE BOARD OF ESTIMATE.

The City Council may create a Board of Estimate, the members of which shall be selected in such manner as the City Council may provide. Such board shall, before the passage of the annual appropriation bill by the City Council, submit to the City Council reports of its estimates of moneys necessary to be appropriated in such bill. The City Council may require the several departments, bureaus, officers, boards and commissions of the city government, and other institutions for which moneys are appropriated by the City Council, to transmit to said Board of Estimate, estimates in writing of the amount of expenditures required for their respective departments, bureaus, etc.

INDEBTEDNESS.

The City Council is vested with authority to issue interest bearing coupon bonds and make provision for the pay-

ment of such bonds and interest. City funds may also be invested in city bonds for tax warrants.

The City of Chicago may become indebted for municipal, educational and school building purposes to an amount (including all municipal corporations lying within the limits of Chicago which are not consolidated therewith, and the city's proportionate share of the indebtedness of the County of Cook and of the Sanitary District of Chicago), in the aggregate not exceeding 5 per centum of the full value of the taxable property within the limits of said city as ascertained by the last assessment for state or municipal purposes previous to the incurring of such indebtedness.

PARKS.

The City of Chicago shall be vested with all present powers heretofore granted to any park commissioners, park boards or boards of park commissioners whose authority is abrogated by this act.

BOARD OF PARK COMMISSIONERS.

Within thirty days after the adoption of this act, a Board of Park Commissioners consisting of nine members shall be appointed by the mayor, by and with the advice and consent of the City Council, three of whom shall be residents of that portion of the city lying north of the Chicago River, three shall be residents of that portion lying south of the Chicago River, and the three remaining members shall be residents of that portion lying west of the north and south branches of the Chicago River. Said park commissioners shall serve without compensation and shall not hold any other office under the city government. Such board shall elect a president from their own board, who shall hold office for a term of one year.

The Board of Park Commissioners shall have full power to manage and control, improve, maintain and beautify the parks of the city in accordance with appropriations made in bonds issued by and under authority of the City Council.

PUBLIC LIBRARY.

The City Council shall have full power to manage, control, maintain, operate and extend or enlarge the public library of the City of Chicago, and to exercise any and all powers and rights not inconsistent with the provisions of this act, now vested in the Board of Directors of said library under the laws of the state relating to such libraries.

HOUSE OF CORRECTION.

The City Council shall have full power to manage, control, maintain, operate and extend or enlarge the House of Correction of the City of Chicago, and to exercise any and all powers and rights, not inconsistent with the provisions of this act, now vested in the board of inspectors of such house of correction and the municipal and legislative authorities of cities under the laws of the state.

If any article, section, etc., of this act is for any reason held invalid, or to be unconstitutional, such decision shall not affect the validity of the remaining portions of this act, which can be given effect without such invalid part.

SUBMISSION OF ACT TO LEGAL VOTERS.

Before the provisions of this act become effective, the act must be submitted for adoption, respectively, to the legal voters of the several towns or townships, parks or park districts, or other local governments and authorities sought to be consolidated.

BY ORDINANCE.

The City Council may by ordinance direct that the question of the adoption of this act shall be submitted to such legal voters at any general, municipal or special election in and for the entire city to be held not less than thirty days from and after the passage of such ordinance.

The City Clerk of the City of Chicago shall promptly

certify the passage of such ordinance to the Board of Election Commissioners and it shall thereupon be the duty of the Board of Election Commissioners to submit the question of the adoption of this act to such legal voters.

BY PETITION.

The question of the adoption of this act may also be submitted in the following manner. A petition signed by at least 5 per cent of those voting at the last preceding election for mayor, praying for the submission of the question of adopting this act, may be filed with said Board of Election Commissioners, and it shall thereupon be the duty of the Board of Election Commissioners to submit said question to such legal voters at the next general, municipal or special election in and for the entire city to be held not less than forty days from and after the filing of such petition.

MAJORITY VOTE REQUIRED FOR ADOPTION.

If a majority of such legal voters of the City of Chicago and a majority of such legal voters of any two or more, severally and respectively, of said towns or townships, parks, park districts, or other local governments and authorities, voting thereon, shall vote for the adoption of this act, it shall thereby and thereupon be adopted by and be in force and effect in the City of Chicago and in such towns or townships, parks or park districts, etc., thus voting for the adoption of the act.

TOTAL FAILURE OF ADOPTION—RESUBMISSION FROM TIME TO TIME.

If the act shall fail to be adopted, at any time at which it is submitted by a majority of the legal voters of the City of Chicago voting on same, and a majority of such legal voters within the jurisdiction of at least two of such towns or townships, parks, park districts, or other local governments and authorities, sought to be consolidated, voting

thereon, it may be resubmitted from time to time, if directed by ordinance or by a petition signed by at least 5 per cent of the voters who voted at the last preceding election for Mayor of Chicago, the procedure to be in all other respects the same as when first submitted.

PARTIAL ADOPTION—RESUBMISSION FROM TIME TO TIME.

If said act shall be adopted at any election by a majority of such legal voters of the City of Chicago voting thereon, and a majority of such legal voters, voting thereon, *within the jurisdiction of at least two, but not all*, of the respective towns or townships, parks, park districts, or other local governments and authorities sought to be consolidated, then it may be resubmitted, *from time to time*, to such legal voters of the respective towns or townships, parks, etc., failing to adopt this act.

RESUBMISSION MAY BE DIRECTED BY ORDINANCE OR PETITION.

Such resubmission may be directed by an ordinance of the City Council or demanded by a petition signed by such legal voters of the respective towns or townships, parks, etc., failing to adopt this act, equal in number to at least 5 per cent of such persons voting at the last preceding election for Mayor of Chicago, the procedure for such resubmission to be in all other respects the same as when first submitted.

Your particular attention is called to the fact that, under the provisions of said act, the question of the adoption of same may be submitted to a referendum vote at *any* general, municipal or special election in and for the entire city, the only qualification as to time in this respect being that if the submission of the question of adoption is the result of a council ordinance, said *ordinance* must have been passed at least thirty days prior to the election at which the act is to be submitted, and if the question of adoption is predicated upon a *petition*, such *petition* must have been filed with the Board of Election Commissioners not less than forty days prior to the election at which such act is to be submitted.

The Public Tuberculosis Sanitarium, Board of Education of the City of Chicago or any school district or part thereof annexed to the City of Chicago, and the sanitary drainage or improvements districts of the City of Chicago do not in any wise come within the purview of said act.

This act vests the City Council with divers powers incidental to the enjoyment and exercise of the general powers and functions hereinbefore referred to conferred upon the City of Chicago. If you desire more detailed information in this regard we shall be pleased to furnish you with same.

Respectfully submitted,

JOHN A. COOKE,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Regulation of Automatic Weighing Machines.

December 10, 1915.

HON. OTTO KERNER, Chairman, Committee on Judiciary,
Chicago, Illinois.

Dear Sir:

Your committee sent to this department an order introduced in the City Council on November 8, 1915, by Alderman Bergen and referred to the Committee on Judiciary, with a request that an ordinance be drafted regulating the placing and operation of weighing machines in accordance with the provisions of said draft of council order.

The said order recites in a preamble that accidents have happened and may in the future happen on account of the maintenance of automatic weighing machines on the sidewalks and public ways of the city, and that it is important that the city should exercise strict power of regulation over said machines, and that bonds should be filed with the city to indemnify it and save it harmless from liability which may

accrue against it by reason of the operation of said machines, and then directs the corporation counsel to draft and submit to the Committee on Judiciary an ordinance regulating the placing and operation of such weighing machines on the sidewalks and other public ways of the city, the same to provide for payment of compensation and for the filing of bonds with the city.

It would, of course, be an easy matter to draft and present an ordinance embodying the features called for in the said order, but we question whether such an ordinance would stand the test of validity. The sidewalks of the city belong to the public and the city has no authority to rent out space on same. It is true that at the present time it permits temporary newspaper stands to be maintained thereon during certain hours of the day for the sale of newspapers published in Chicago and such use may be regarded as excusable on account of the convenience of the public and the reduced danger to the public and the sellers of newspapers. But such a provision as is contained in this order practically amounts to renting out space on the sidewalks, and we know of no grant of power under which this can be lawfully done.

The statute now permits the use of overhead space where the same extends more than twelve feet above the sidewalk. It also permits the use of sub-sidewalk space, and in each case provides that the city may receive compensation. No provision, however, is made for the letting of space on the sidewalk itself, nor can it be said that because the city exacts compensation when switch-tracks are permitted to extend across or on streets that such use alters the status in any degree. In contemplation of law the use for a switch-track is a public purpose and it does not interfere with traffic. The same may be said with regard to wagon scales.

We are also mindful of the fact that the City Council sometimes grants authority to erect a clock or to erect an ornamental lamp post or other electric sign on the sidewalks, and provides for a bond in such cases, and that the privilege of allowing signs to be erected on sidewalks is frequently

given. But none of these privileges so granted are put upon the basis of vesting right or authority in any one to use the public sidewalks for compensation.

We are, therefore, of the opinion that such an ordinance as proposed would be invalid, and that no better reason exists for selling space on sidewalks for purposes of scales than for purposes of the sale of ordinary merchandise.

If after considering this opinion you are still desirous of having an ordinance drafted of the kind mentioned, we will prepare same.

We return herewith the council document submitted by the city clerk.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Interpretation of Political Inhibition in Civil Service Act.

December 13, 1915.

HON. PERCY B. COFFIN, President, Civil Service Commission.

Dear Sir:

Replying to your request of the 29th ult., in effect that we give you an opinion as to the proper construction of the words "for any political purpose whatever" and "promotion of any political object whatever" as used in Sections 21, 22, 23 and 24 of the Civil Service Act, we beg to say that as a matter of course, the proper construction of these words is largely governed by their context. These sections read as follows:

"Sec. 21. NO OFFICER TO SOLICIT OR RECEIVE POLITICAL CONTRIBUTIONS.) No officer or employe of such city shall solicit, orally or by letter, or receive or pay, or be in any manner concerned in soliciting, receiving or paying any assessment, subscription or contribution for any party or political purpose whatever.

“Sec. 22. NO PERSON TO SOLICIT POLITICAL CONTRIBUTION FROM OFFICERS OR EMPLOYEES.) No person shall solicit, orally or by letter, or be in any manner concerned in soliciting, any assessment, contribution or payment for any party or political purpose whatever, from any officer or employe in any department of the city government of any city which shall adopt this act.

“Sec. 23. ASSESSMENTS AND CONTRIBUTIONS IN PUBLIC OFFICES FORBIDDEN.) No person shall in any room or building occupied for the discharge of official duties by any officer or employe in any city which shall adopt this act, solicit, orally or by written communication delivered therein, or in any other manner, or receive, any contribution of money or other thing of value, for any party or political purpose whatever. No officer, agent, clerk or employe under the government of such city, who may have charge or control of any building, office or room occupied for any purpose of said government, shall permit any person to enter the same for the purpose of therein soliciting or delivering written solicitations for receiving or giving notice of any political assessments.

“Sec. 24. PAYMENTS OF POLITICAL ASSESSMENTS TO PUBLIC OFFICERS PROHIBITED.) No officer or employe in the service of such city shall directly or indirectly, give or hand over to any officer or employe in said service, or to any senator or representative or alderman, councilman or commissioner, any money or other valuable thing, on account of or to be applied to the promotion of any party or political object whatever.”

It will be noted that in each instance the language is designed to forbid contributions and the making and collection thereof “for any party or political purpose (or object) whatever.” The word “political” is defined in the Standard Dictionary as:

“Pertaining to public policy; concerned in the administration of government; belonging to the enactment and administration of the laws”;

and also as:

“Pertaining to or connected with a party or parties controlling or seeking to control government in a state.”

These definitions may be taken as fairly typical of those given by the various lexicographers which seem to be applicable to the present situation. The former may be regarded as the broad, general definition and the latter as defining the use of the word in the more popular sense in which it is frequently used as relating to mere party matters. What must be regarded as a classic definition of the word "political" from the standpoint of judicial interpretation is that of Bouvier's Law Dictionary, which is:

"Pertaining to policy, or the administration of the government."

This definition corresponds closely to what we have referred to above, as the broad, general definition of the ordinary dictionaries as opposed to what we have termed the popular definition and has been expressly adopted by the Illinois Supreme Court in the case of *The People ex rel. v. Morgan*, 90 Ill. 558, which involved the appointment of certain park commissioners. The court there said, page 562:

"If it were conceded, that these appointments were the exercise of political power, would it necessarily be violative of any provision of the constitution? The division and allotment of the powers are not into political, executive and judicial, but into legislative, executive and judicial. It was, no doubt, the exercise of political power, as that embraces all governmental powers and functions, whether exercised by one department or another, or the officers of one or the other. Political power is the policy of government or its administration, and may be exercised either in the formation or administration of government, or both. Hence it follows, that if it be a political power, that, of itself, in nowise militates against its exercise by a person belonging to the judicial department of the government.

"The word 'political,' is defined by Bouvier to be, pertaining to policy or the administration of government. Political rights are those which may be exercised in the formation or administration of the government. And we understand the term 'rights,' as used in this definition, as being synonymous with power. All three departments aid in the administration of government, but perform different functions. * * *"

To the same effect is the case of *People ex rel. v. Hoffman*, 116 Ill. 587, 602.

By Article III of the Illinois Constitution of 1870, it is provided that:

“The powers of the government of this state are divided into three distinct departments—the legislative, executive and judicial * * *”

The American and English Encyclopedia of Law (Vol. 22, p. 942), defines the word “political” as follows:

“Political means pertaining to the policy or the administration of government.”

citing *People ex rel. v. Morgan, supra*.

In the Cyclopedia of Law and Procedure, the definition adopted is (Vol. 31, p. 907):

“POLITICAL. Pertaining to policy or the administration of government.”

citing Bouvier and referring to his definition as quoted in *People ex rel. v. Morgan, supra*.

When we come to consider the phrase “for any party or political purpose (object) whatever” as used in the sections of the Civil Service Act as above quoted, it seems obvious that the legislative intent was to use the word “political” in the broad, general sense of “pertaining to the policy or administration of government.” It is fundamental in the rules of construction that every word must, if possible, be given some effect. If the Legislature had intended the narrow, popular meaning, then that meaning has been expressed by the use of the word “party” and the use of the word “political,” preceded by the disjunctive “or” is meaningless. Plainly, the legislative intent was to forbid not only contributions for party purposes, but also for any purpose or object whatever, designed to affect the policy or administration of government in either of its branches, executive, legislative or judicial. Our conclusion is strengthened by the addition of the word “whatever” after “purpose,” indicating an intent to convey the broadest possible meaning.

Bearing this construction in mind, the question of whether there has been a violation of the sections above quoted resolves itself into a question of fact as to whether particular contributions have been solicited or made for a purpose or object calculated to affect the policy or administration of government. If such contributions are designed to bring about a particular policy in any governmental department or to procure the administration of the law in any particular way, then they are within the prohibition of the statute. It is clear that policy or administration of government can only be affected by affecting its agencies. If the design or purpose of the solicitation or contribution is a part of a concerted action to have one of the agencies of government, say the Police Department of the City of Chicago, administered in a particular way, or to affect the policy thereof, then we are of the opinion that the contribution and the soliciting thereof are forbidden by the statute.

Our conclusion is that the proper construction of the words "political purpose" or "object," as used in Sections 21, 22, 23 and 24 of the Civil Service Act, is that they are to be taken as meaning a purpose (or object) pertaining to the policy or administration of government, by or through any of its branches or agencies, executive, legislative or judicial; that the gist of the offense prohibited by the statute is making or soliciting a contribution designed to influence such policy or administration; and that the test to be applied to discover whether such offense has been committed is to ascertain as a matter of fact whether the purpose or object of such contribution or solicitation pertains to the policy of government or its administration, by and through its branches and agencies.

Yours very truly,

GEORGE E. CHIPMAN,
First Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTTELSON,
Corporation Counsel.

**Ordinance Authorizing Comptroller to Make Endorsements
on Special Assessment Rebate Warrants.**

December 13, 1915.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

We have your letter of recent date, wherein you request us to prepare an ordinance to be passed by the City Council authorizing you to make endorsements on special assessment rebate warrants.

We have thoroughly examined the city charter and the various acts under the charter on cities, villages and towns, including the Local Improvement Act, under which latter act the Board of Local Improvements and the manner of payment by special assessments and the return of rebates was created by the Legislature, and we have also examined several authorities as to the powers of the City Council to pass such an ordinance, but nothing is found in either the charter or the chapter on cities, villages and towns, and nothing in the act creating the Board of Local Improvements nor under the Revenue Act which would authorize the City Council to pass such an ordinance as you request.

Section 93, of the Local Improvement Act, is as follows:

“REBATES DECLARED AND PAID.) If, upon final settlement with the contractor for any improvement and full payment of all vouchers or bonds, issued on account of such contract, there shall be any surplus remaining in such special assessment or special tax above the payments aforesaid, and above the amount necessary for the payment of interest on such vouchers or bonds as above provided, it shall be the duty of the proper authorities of such city, incorporated town or village to at once cause a rebate to be declared upon each lot, block, tract or parcel of land assessed of its *pro rata* proportion of such surplus. The Board of Local Improvements shall cause to be kept and exhibited publicly in its office an index of all warrants upon which rebates are due and payable, and upon proper proofs, the same shall be repaid to the person entitled thereto.

(As amended by act approved and in force May 9, 1901. L. 1901, p. 117.)”

The Local Improvement Act, which is a complete act, giving to municipalities the power to make certain local improvements, contains within itself all of the provisions which have been delegated to municipalities relative to local improvements.

It is very evident from your letter that the purpose of the ordinance is to simplify the manner of holding uncalled for rebates, and is merely a matter of convenience for your office.

It is a well known principle of law that municipal authorities have only such powers as are granted to them by the Legislature. They only exercise delegated and limited powers.

“The power of the city to pass an ordinance must be found in its charter in express terms, or it must be necessary in order to carry out the powers expressly granted, or be essential, and not simply convenient, to the declared objects and purposes of the corporation.”

City of Marengo v. Rowland, 263 Ill. 533.

Neither in the charter of the City of Chicago, nor in any subsequent act of the Legislature, has any authority been given to the City Council to endorse such rebate warrants.

In *City of Chicago v. Pettibone*, 267 Ill. 573, the question of the right of the City of Chicago to pass a certain ordinance was in dispute, and the court in holding that there was no authority in either the charter nor in any of the subsequent acts of the Legislature giving the right to the city to pass the ordinance in question, there said:

“The authority of the City Council to pass any ordinance must be found in some act of the legislature. Such authority is always strictly construed, and any reasonable doubt of its existence must be resolved against the right of the municipality to its exercise.”

The court in that case held that the city had no right to pass the ordinance in question.

In the case of *O'Connell v. Sanford*, 256 Ill. 62, the question of the right of the City of Chicago to purchase real estate, at a sale for taxes or special assessments, in which the city was interested, was in dispute. The court therein held that Section 72 of the Local Improvement Act authorized the city to so purchase such real estate, and it also held there that in the absence of an enabling statute authorizing the city to purchase real estate at a sale, the city would have no power or right to purchase real estate unless as authorized under the Local Improvement Act. That being true, it follows by analogy that before the City of Chicago would have the right to deposit the uncalled for rebate warrants to the credit of the special assessment fund undistributed, such authority would have to be had under some section of the Local Improvement Act.

We, therefore, conclude that the Legislature has not empowered the city to pass an ordinance of the character of the one requested in your letter to be drawn. We would therefore suggest that a bill be presented to the next Legislature authorizing the city to pass such an ordinance.

Respectfully submitted,

DAVID T. ALEXANDER,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Right of Civil Service Employee to Resign While Charges Are Pending.

December 14, 1915.

HON. WM. R. MOORHOUSE, Commissioner of Public Works.

Dear Sir:

In answer to your request for an opinion as to the right of an employe in the classified service of the city to resign after his suspension by the head of the department, and while charges against him are pending for investigation

and trial by the Civil Service Commission, we respectfully submit the following:

“An office must be resigned either (first) expressly, or (second) by implication. If the charter prescribes the mode in which the resignation is to be made, that mode should of course be complied with. Acceptance by the corporation is, at common law, necessary to a consummation of the resignation, and until acceptance by proper authority, the tender or offer to resign is revocable. * * * The right to accept a resignation is a power incidental to every corporation. It is also a common law principle that the right to accept the resignation of an officer is incidental to the power of appointing him.”

Dillon on Mun. Corp., 5th Ed., p. 723 (Sec. 416).

“At common law the resignation of a public officer was not complete, so far as the public is concerned, until it was duly accepted by the proper authorities. And this rule prevails in many of the states, though not in all, and, except where there is a statutory provision to the contrary, is supported by the weight of both reason and authority. ‘An officer may certainly resign,’ says Chief Justice Ruffin, ‘but without acceptance his resignation is nothing, and he remains in office.’”

Mechem on Pub. Offices, Chap. 3, p. 263 (Sec. 414).

The Legislature has not attempted to change the common law in this state, in so far as it applies to resignations of public officers.

In Chapter 46, Section 124, concerning elections, it is provided that resignations of elective offices shall be made to the officer, court or county board authorized by law to fill a vacancy in such office by appointment, or to order an election to fill such vacancy. Section 125 of the same act provides that an elective office shall become vacant by resignation. But the act makes no provision for determining when the act of resignation becomes effective, and, consequently, the common law on that subject must prevail.

Nothing is found in the statutes specifically defining the procedure in resignations of employes of corporations, municipal or state, as contra-distinguished from public officers.

In the case of *Edwards v. United States*, 103 U. S. 475, the court uses this language:

"Section 617 of the Compiled Laws declares that 'every office shall become vacant on the happening of either of the following events before the expiration of the term of such office: First, the death of the incumbent; second, his resignation; third, his removal from office, etc.' But it is nowhere declared when a resignation shall become complete. This is left to be determined upon general principles. And in view of the manifest spirit and intent of the laws above cited, it seems to us apparent that the common-law requirement—namely, that a resignation must be accepted before it can be regarded as complete—was not intended to be abrogated. To hold it to be abrogated would enable every office-holder to throw off his official character at will, and leave the community unprotected. We do not think that this was the intent of the law."

The Michigan statute referred to by the court is similar to our own statute on the subject of resignations.

Under Section 4 of "An Act to regulate the civil service of cities," the Civil Service Commission is given authority to make rules to carry out the purposes of the act and for examinations, appointments and removals in accordance with its provisions.

Section 12 of the aforesaid act provides that no officer or employe in the classified civil service in any city, who shall have been appointed under said rules and after said examination, shall be removed or discharged except for cause, upon written charges and after an opportunity to be heard in his own defense.

Section 8 of Rule 8, adopted by the Civil Service Commission of the City of Chicago, reads in part as follows:

"Sec. 8. RESIGNATION.) The resignation of an officer or employe from the classified service shall be filed with the commission by the head of the department receiving and accepting the same, and shall be effective only on approval by the commission. The commission may permit the withdrawal of such resignation and its cancelation upon application at any time within thirty days after the filing of the same * * *."

The rules adopted by the Civil Service Commission in pursuance of the power granted in the act creating the commission have been decided by the courts, in a long line of decisions, to be binding upon the commission and to have the same force as a legislative enactment unless they are in direct contravention of some law enacted by the Legislature.

In *Lindblom v. Doherty*, 102 Ill. App. 29, the court says:

“That the commission is bound by its rules, made in pursuance of Section 4 of the act, is beyond controversy. Its rules made in pursuance of the act, and authorized by it, are as binding on the commission as if made directly by the Legislature. (*Mason v. Shawneetown*, 77 Ill. 533; *Tudor v. Rapid Trans. R. R. Co.*, 154 Ill. 129 & 136.)”

In the case of *City of Chicago v. Bullis*, 124 App. 17, the court says:

“* * * The Civil Service Commission is powerless to disregard a valid rule, while it remains in force. (*Ptacek v. The People*, 94 Ill. App. 571; affirmed in 194 Ill. 125.) Rule 8 was made by the commission in pursuance of Section 4 of the Civil Service Act, and is as binding as if made directly by the Legislature.”

In discussing the failure of the commission to give notice to appellee as required by Section 1 of Rule 8 of the Civil Service Commission, in *Powell v. Bullis*, 221 Ill. 381, the court says:

“The giving or waiver of such notice was clearly jurisdictional (*Commissioners of Highways v. Smith*, 217 Ill. 250), and as the court could only determine that question from an examination of the record filed as a return to the writ (*Joyce v. City of Chicago*, 216 Ill. 466), and the record failed to show that Bullis had been notified or waived notice of the time and place of his hearing upon the charges preferred against him, we think the Police Trial Board was without power to hear the charges made against him or the Civil Service Commission to approve the same and order him discharged as a patrolman from the police force of the City of Chicago,

and that the trial court properly quashed the proceedings of the commission.”

Under Section 8 of Rule 8 above referred to, resignations of officers or employes in the classified service will be effective only upon approval by the commission, and such commission may permit the withdrawal of such resignation and its cancelation upon application at any time within thirty days after the filing of the same. It necessarily follows that an employe who has the right under the rules to withdraw his resignation cannot be said to be outside of the jurisdiction of the commission, at least until after the expiration of thirty days from his purported resignation.

Our conclusion from a consideration of the foregoing act creating the civil service, the rules referred to adopted by the commission, and the authorities cited, is that the resignation of an employe in the classified service of the city does not become effective until it has been filed with the commission by the head of the department receiving and accepting the same and has been approved by the commission;

That such employe remains under the jurisdiction of the commission and has the right to withdraw such resignation with the approval of the commission at any time within thirty days of the tender of such resignation;

That there is nothing in the statutes of this state which abrogates the common law rule that resignations, to be effective, must be accepted by the proper officers; and

That Section 8 of Rule 8, adopted by the Civil Service Commission, is a valid and lawful rule and that the commission had a clear right to adopt the same under the authority given in the Civil Service Act.

Respectfully submitted,

EDWARD H. WRIGHT,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Interpretation of Ordinances Relating to Department of Supplies.

December 15, 1915.

HON. VIRTUS C. ROHM, Business Agent.

Dear Sir:

In conformity with your request for a construction and interpretation of the ordinances under which your department operates, we desire to submit the following:

Sections 2513 to 2521 inclusive, as amended March 9, 1914 (Council Journal of that date at Pages 4347-8), are the particular sections of The Chicago Code which are applicable to your department. We will treat each section separately, and outline what we believe to be a fair and reasonable construction of the same.

Section 2513: This section establishes a department to be known as the Department of Supplies.

Section 2514: Creates the office of business agent to be the head of said Department of Supplies.

Section 2515: Provides that the business agent furnish bond.

“Section 2516. SUBJECT TO RULES AND REGULATIONS OF COMPTROLLER.) Said business agent, in all things pertaining to his office in the discharge of the duties thereof, shall conform to the rules and regulations of the city comptroller.”

This section provides that the business agent shall at all times be *amenable to all rules and regulations of the city comptroller* relative to his department.

“Sec. 2517. PURCHASE OF SUPPLIES.) He shall make all purchases of supplies and materials for the use of the city, and shall let all contracts for labor to be performed for the city in cases wherein the cost of supplies, material or labor shall be less than the sum of five hundred dollars (\$500). Requisitions shall be made for all supplies, materials and labor required to be furnished by said business agent as herein provided, and said requisitions shall be approved in writing by the heads of the departments for which the same are re-

quired. From time to time, as requested by the business agent, each department head shall submit to him written estimates of the quantities of supplies and materials required by such department during the period of time specified in such request. Such requisitions and estimates shall constitute his authority for purchases and contracts made under the provisions hereof, and shall be filed in his office; provided, that the commissioner of health shall make all purchases of and let all contracts for medicinal, preventive and curative supplies and materials and such other supplies and materials as require a technical knowledge of medicine, pharmacy or chemistry in their manufacture or preparation for use, for the Department of Health, and also, whenever there is an emergency for the printing, publication and dissemination of information relative to the treatment or prevention of contagious or epidemic diseases in cases wherein the cost of said supplies, printing or materials shall be less than the sum of two hundred and fifty dollars (\$250) without regard to the conditions of this chapter."

This section empowers the business agent to purchase supplies and materials where the cost of the same is less than five hundred dollars, and he is authorized to purchase after a requisition has been made on him for same by a department head. It also provides that he has the power to contract for labor to be performed for the city where the cost will be less than five hundred dollars.

There is a provision in this section that, "from time to time, as requested by the business agent, each department head shall submit to him written estimates of the quantities of supplies and materials required by such department during the period of time specified in such request."

This provision makes it mandatory on the business agent to request estimates, it being left to his sound discretion as to what period of time he will require estimates for.

After he has received such estimates he is authorized to purchase where such estimates, in the aggregate, total for all departments less than five hundred dollars. In other words, a requisition may be made on the business agent for an article which is not in common use in the city govern-

ment, and the department head, having no means of ascertaining in advance that he would require such an article in conformity with the provision of the ordinance, he will issue a requisition on your department for the same, which, if the cost is less than five hundred dollars, you will purchase.

In requesting department heads to submit written estimates, they shall give you the same, and as suggested before, these estimates with regard to the period of time, rest in your sound discretion. Where the total amount of such estimate for a certain material or supply is less than five hundred dollars, you may purchase it. The rest of the section provides that the commissioner of health shall be empowered to enter into contracts where an emergency exists in his department and the contract price is less than two hundred and fifty dollars.

Section 2518: Provides that the business agent shall be responsible for the stock, and that he shall issue the same to departments on requisition from department heads, and provides for the system to be used in his office with regard to charging the several departments for purchases made.

Section 2519: Provides that bills for purchases made by the business agent shall be approved by him before the comptroller pays same.

“Section 2520. TERMS OF PURCHASES.) It shall be the duty of the said business agent to make all purchases upon the most advantageous terms, and to this end he shall procure competitive proposals from at least two responsible persons, firms or corporations, and shall take advantage of the lowest prices quoted for goods of equal value. In all cases, except contracts for labor to be performed for the city on repair work, wherein the expenditure of sums in excess of three hundred dollars (\$300) and below five hundred dollars (\$500) is involved, except as provided by Section 2520a, he shall procure sealed bids, in writing, from at least three bidders, which bids shall be opened at a time to be stated in the notice calling for such bids, and which bids shall be filed with the requisitions pursuant to which the said expenditures are made.”

This section provides for the terms upon which the busi-

ness agent shall purchase, in that he shall make all purchases upon the most advantageous terms, and shall, in cases wherein the expenditure is three hundred dollars or less, procure proposals from two responsible bidders, that he shall award the purchase to the lowest bidder where the goods are of equal value. In cases where the expense is in excess of three hundred dollars he shall procure sealed bids in writing from at least three bidders, which bids shall be opened at a time to be stated in the notice calling for such bids, and which bids shall be filed with the requisition pursuant to which the said expenditures are made. This section, in addition to purchases of three hundred dollars and less, which may be purchased by proposal, contemplates purchases made in excess of three hundred dollars and below five hundred dollars, upon *requisition and not upon estimates*. It is also provided in this section that contracts for labor or repair work are accepted and not covered in the section.

“Section 2520a. CONTRACTS.) Said business agent may make contracts for the furnishing of supplies and materials for the use of the city, which are in constant use and demand, covering a period of time not exceeding six months nor extending beyond the fiscal year, where the aggregate cost of the supplies and materials, furnished under such contract, does not exceed the sum of two thousand five hundred dollars (\$2,500); provided, that no such contract shall be made for a greater quantity of supplies and materials than the total amount required by all the departments within the period of time covered by the same as shown by the departments' estimates submitted to the business agent. In all cases wherein such contracts involve the expenditure of a sum in excess of five hundred dollars (\$500) and below two thousand five hundred dollars (\$2,500), in the aggregate, the same shall be let to the lowest responsible bidder, after advertising, in the same manner as is provided for the letting of contracts involving an expenditure of over five hundred dollars (\$500) by the Department of Public Works, and where such contract involves the expenditure of a sum less than five hundred dollars (\$500), in the aggregate, the same shall be let to the lowest responsible bidder, after sealed bids, in writing, from at least three bidders, have been procured, which bids

shall be opened at a time to be stated in the notice calling for such bids."

This section gives authority to the business agent to *contract* for supplies and materials which are in *constant use and demand* up to twenty-five hundred dollars, providing that such contracts can only be made where estimates have been furnished to him by department heads, and then he shall not contract for a period of exceeding six months or beyond the fiscal year. He cannot contract for a greater quantity than shown by the total amount required by *all* departments within a period of time as shown by the estimate submitted to him. This section, which is similar in certain respects to 2517 heretofore mentioned, leaves the period of time for which he shall request estimates within his discretion, having in mind at all times the best interests of the city, as in some cases it would no doubt be advantageous to contract for the longest period allowed under the ordinances and in other cases to contract for a shorter time. In contracts involving in excess of five hundred dollars and below the maximum allowed him of twenty-five hundred dollars he shall follow the manner providing for the letting of contracts by the Department of Public Works, in which case the business agent must let the contract to the lowest bidder after advertising, etc. Where the contract involves a lesser sum than five hundred dollars he shall let the same to the lowest responsible bidder after sealed bids in writing from at least three bidders have been procured.

Section 2521: Provides that the business agent shall keep a record of purchases made by him and contracts entered into by him.

It is impossible in a general opinion of this kind to anticipate the particular and peculiar instances which will arise in your department at various times, but we believe that the foregoing, when read in connection with the opinion of Mr. James G. Skinner of this department, and approved by Mr. George E. Chipman, Acting Corporation Counsel,

under date of November 29, 1915, will give you the status and powers of your department.

Respectfully submitted,

W. H. DEVENISH,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTTELSON,

Corporation Counsel.

Police Power of City in Regard to Sign Boards.

December 17, 1915.

MESSRS. ALBERT H. WETTEN & Co., 108 South La Salle Street.

Gentlemen:

We have your letter of December 14, 1915, making inquiry as to the changing of a sign on the premises located at No. 32 South Michigan avenue. You say in your letter: "The building on which this sign is placed sits back from the front lot line several feet, so that no part of the sign projects over the sidewalk."

For your information we beg to advise you that the ordinances of The Chicago Code of 1911 covering signs are as follows:

"695. BILLBOARDS AND SIGNBOARDS ON BUILDINGS—CONSTRUCTION—HEIGHT.) No billboard or signboard shall be erected or placed upon or above the roof of any building or structure within the limits of the City of Chicago; and it shall be unlawful for any person, firm or corporation to attach any billboard or signboard to the front, sides, or rear walls of any building, unless the same shall be placed flat against the surface of the building and safely and securely anchored or fastened thereto in a manner satisfactory to the commissioner of buildings."

"849. PROJECTING SIGNS, ETC., PROHIBITED—EXCEPT ILLUMINATED SIGNS.) No person shall place or suspend from any building, structure, lot or place any goods, wares, or merchandise whatever, or signs other than illuminated signs as hereinafter provided, or any other

thing, so that the same shall project from the wall or front of such building, structure, lot or place, into the street or over the sidewalk. Whoever shall violate any of the provisions of this section shall be fined not less than five dollars nor more than fifty dollars for each offense."

Under Clause 66 of Section 1, Article 5 of the Cities and Villages Act (Hurd's Revised Statutes 1913), the Legislature authorized municipalities "to regulate the police of the city or village, and to pass and enforce all necessary police ordinances."

Under Section 75 of the same act municipalities are authorized "to declare what shall be a nuisance, and to abate the same; and to impose fines upon parties who make, create, continue or suffer nuisances to exist."

In 1909 the Legislature passed an act giving to cities, villages and incorporated towns the power "to license street advertising by means of billboards, signboards and signs, and to regulate the character and control the location of such billboards, signboards and signs upon vacant property and upon buildings."

While it may be true that in your instance the sign in question does not project over the sidewalk line, nevertheless under the foregoing powers delegated to the City of Chicago, our Supreme Court has repeatedly held that, under the police regulations, municipalities have the right to provide by ordinance such reasonable regulations as are necessary for the protection of the public health, morals or safety.

In the case of the *City of Chicago v. Gunning System*, 214 Ill. 628, the court in its opinion, on page 634, said as follows:

"It is claimed by appellee that under Clause 17 of Section 2, Article 5 of the City and Village Act, the city can regulate and prevent the use of signs on the streets and public places of the city; that this is a specific provision relating to signs, and that the power thus expressly granted cannot be added to by the general language found elsewhere in the act, and that there is no authority conferred by statute upon municipalities to regulate billboards erected upon private property. We

cannot agree with this contention, but are of the opinion that there is ample power, under paragraphs 66 and 75 of Section 1, Article 5 of the City and Village Act, (Hurd's Stat. 1899, p. 277), to authorize municipalities to pass reasonable ordinances covering said subject. Paragraph 66 confers upon cities power 'to regulate the police of the city or village and pass and enforce all necessary police ordinances.' "

And again, on page 636, the court in its opinion said:

" 'Police regulations to direct the use of private property so as to prevent its proving pernicious to the citizens at large are not void, although they may in some measure interfere with private rights without providing for compensation. This principle was announced in the cases of *Vanderbilt v. Adams*, 7 Cow. 349, and *Stuyvesant v. Mayor of New York*, 7 *id.* 588, and the counsel for the failing party in the latter case admitted that the principle was too clear to be questioned. 'The contrary doctrine,' says the court in the same case, 'would strike at the root of all police regulations.' The order of the mayor and aldermen stands on the same footing as quarantine and fire regulations, and if by such regulation an individual receives some damage it is considered as *damnum absque injuria*. The law presumes he is compensated by sharing in the advantages from such beneficial regulations. *Dore v. Gray*, 2 T. R. 358; *Governor v. Meredith*, 4 *id.* 794; *Baker v. Boston*, 12 Pick. 193. See Cooley's Const. Lim., 748; 1 Dillon on Mun. Corp., Sec. 405.' "

And continuing, on page 640, the court in its opinion said:

"Nor will the mere fact that such structures are placed upon private property, and not on the public streets, protect those owning or using them against such reasonable regulations. The police power invades individual rights and property whenever private individuals, by the use of their private rights or private property, injure the public in any of the above mentioned ways. The one essential and universal limitation upon the exercise of the police power is, however, that the regulation shall be reasonably necessary and reasonably exercised.' "

This being the settled law of our state, we therefore con-

clude that the sign in question comes within the reasonable police regulations and the ordinances above quoted covering signs of this character, and you will, therefore, be required to make the change as you were notified to do by the commissioner of buildings.

Very truly yours,

DAVID T. ALEXANDER,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Sunday Closing Law Observance.

December 17, 1915.

HON. JOHN SIMAN, City Clerk.

Dear Sir:

We reply to your request on behalf of the Committee on License for an opinion in regard to the proper answer to certain questions designated from "a" to "h," both inclusive, and concerning the Sunday Closing Law, as follows:

The statute in question reads:

"Whoever keeps open any tippling house, or place where liquor is sold or given away, upon the first day of the week, commonly called Sunday, shall be fined not to exceed \$200.

"Sunday shall include the time from midnight to midnight."

Hurd's Statutes, 1911, page 819.

The intent of this statute, as defined by the Illinois Supreme Court, is not only to prevent the sale of liquor on Sunday, but also to compel those who are likely to assemble in places where liquor is sold or given away to disperse from such places at 12 o'clock Saturday night and so promote peace and good order. Thus in the case of *Koop v. The People*, 47 Ill. 327, it was said in construing this statute, p. 330:

“It is not meet that the law should be evaded under the pretense that the saloon was defendant’s sitting room. It was also accessible to the public and could readily become the resort of the idle and the vicious, and thus be productive of the evil consequences the statute was designed to prevent.”

The case of *Baldwin v. City of Chicago*, 68 Ill. 418, is also directly in point on the question of the intent of such a statute. This was an appeal from a conviction obtained in the Criminal Court of Cook County for violation of an ordinance in these words:

“That any person who shall, in said city, keep open any saloon, bar room, or tippling house during the night time between the hours of 12 o’clock midnight and 5 o’clock a. m., shall be subject to a fine of not less than \$20, nor more than \$100 for each offense.”

In passing upon this appeal, the court said, p. 420:

“The object of the ordinance is manifestly not merely to stop drinking at that hour, but also to compel those who are inclined to collect and tarry at such places, to then depart.

“Such ordinances are for the promotion of the quiet and good order of the city, and it is important that they should be so construed and enforced as to accomplish, as far as may be reasonably practicable, the end had in view in their adoption.”

From these statements and the plain language of the statute it seems clear that the legislative intent was to keep the tippling house or place where liquor is sold or given away closed on Sunday for all kinds of business.

This precise question was before the Illinois Supreme Court in the case of *Baldwin v. City of Chicago*, *supra*, involving the ordinance quoted above, which does not differ essentially from the statute now under consideration. In that case the facts were stipulated as follows:

“The evidence in the case is embodied in this stipulation, signed by the attorneys of the respective parties:

“In this case it is stipulated and agreed that the defendant is a restaurant and saloonkeeper in said city;

that his main business is to provide meals to boarders and transient persons, and that he sells liquors and is duly licensed so to do.

“That he kept open his place of business after the hour of 12 at midnight, for serving meals only.

“And that he did not sell liquor after midnight, but that he did serve meals; that before the hour of 12, he closed his bar, by means of drawing a curtain around it, and thus shut it out of view, and did not open it until after 5 in the morning.

“That the charge against him is, a violation of the ordinance known as the ordinance requiring the closing of saloons at 12 o'clock midnight until 5 o'clock in the morning. It is also agreed that the plan filed herewith is a correct representation of the place of business of said Baldwin.

“It is further stipulated and agreed that, if the court shall find for the plaintiff, a judgment shall be entered for \$20 and costs.”

In passing upon the main question involved, the court said, page 420:

“No objection is urged, and none is apparent, to the reasonableness of the ordinance under which appellant was convicted. It is contended, however, that the facts admitted in the stipulation do not constitute a violation of the ordinance; that liquor selling is but an incident to the business of appellant, and that if this conviction shall be sustained, it must follow that hotels, drug stores, and every business carried on in the city, in which liquor selling is an incident to, but not the main business, will fall within the restrictions of the ordinance. We do not perceive that this result must necessarily follow. That it may follow in some cases is probable, but when it does, it must be because those who own or control hotels, drug stores, etc., shall choose to conduct their entire business in their saloons, bar rooms or tippling houses. When, however, they shall keep their saloons, bar rooms or tippling houses in one room, and conduct their other business in separate rooms, we think the closing of this branch of business at midnight can be effectually done without interfering in the slightest degree with their other business.

“We have no question but the court below decided correctly in holding that the language of the ordinance

extends to the room in which the saloon, bar room or tippling house is kept, and that the mere drawing of a curtain across the portion of the room thus occupied is too transparent a subterfuge to answer the requirement of the ordinance that the saloon, tippling house or bar room shall be closed. To our minds it is clear that the terms used apply to and include the room in which the business is carried on. The object of the ordinance is manifestly not merely to stop drinking at that hour, but also to compel those who are inclined to collect and tarry at such places, to then depart.

"Such ordinances are for the promotion of the quiet and good order of the city, and it is important that they should be so construed and enforced as to accomplish, as far as may be reasonably practicable, the end had in view in their adoption. We perceive no cause for disturbing the judgment below, and it is therefore affirmed."

As the only declaration of our Supreme Court upon the exact questions there discussed the decision in *Baldwin v. City of Chicago*, above quoted, must be regarded as authoritative and fully as binding upon all persons as the statute itself. It may not be out of place, however, to say that the same conclusion has been reached in other states, where practically the identical question has been involved. For instance, the Supreme Court of Michigan in the case of *People v. Gordon*, 120 N. W. Rep. 578, said:

"These defendants were convicted of a violation of 5395 of the Compiled Laws, which requires saloon-keepers to keep their saloons closed on the first day of the week. The saloon in question consisted of two apartments, with arches between them. These apartments were both in one room; the partition separating them being 8 or 9 feet high. On one side of the front entrance was a desk, and next came a cigar case, then a movable screen, extending from the front corner of the cigar case back to the wall. The bar was next, and did not extend so far into the room as the desk and cigar case. It extended back nearly to the partition. On Saturday nights it was the custom of the defendants to surround the bar by a picket fence, 6 feet high, made in sections, and fastened by screws to the bar and wall. They claim to have made this fence at the suggestion of the captain of the police force of Saginaw, who told them that such

device would be sufficient compliance with the law, and would enable them to carry on their restaurant in the rear apartment Sundays. Subsequently they were arrested on the complaint of Walsh for violation of the statute.

* * * *

“It was a violation of the law to keep this place open on Sunday, notwithstanding the fact that the bar was surrounded by a temporary fence. * * *”

In the similar case of *Morganstern v. Commonwealth*, 94 Va. 787, the court said, page 795:

“The first instruction asked for by the defendant announced as the true construction of the statute under which he was indicted, that although his bar room was not entirely closed, but was accessible through a side door, which was the way his boarders, when the front door was closed, had to enter the restaurant conducted by him in the same room with his bar, yet if the bar counter itself was enclosed by a curtain fastened to the floor and extending nearly to the ceiling and there was no one present and ready to dispense intoxicating bitters or liquors the bar room was not open within the meaning of the statute.

“This was an erroneous construction of the statute, and a misconception of the intention of the Legislature as manifested in its enactment. The original (Acts 1874, p. 76) of the present statute prohibited the sale of intoxicating drinks in any bar room, restaurant, saloon, store, or other place from 12 o'clock on each and every Saturday night of the week until sunrise of the succeeding Monday morning. The Legislature subsequently amended and re-enacted the statute (Acts 1877-78, p. 304) into its present form, and thereby declared that ‘no bar room, saloon, or other place for the sale of intoxicating liquors shall be opened during the time it had previously prohibited and still prohibits the sale of intoxicating liquors. It meant that during such time not only that there should be no sale of intoxicating liquors, but that the place in which they were sold the rest of the week should be closed to view, and to all access, except perhaps to the casual entrance of the owner or his employe for some innocent and necessary purpose, so as to remove any temptation to buy or to sell, and all ground of offense to the moral and orderly sentiment to be found in every community which condemns par-

ticularly any traffic in liquor on Sunday. The mere enclosure of the bar counter, while free access is permitted to the room in which the liquors are dispensed, is not a compliance either with the letter or the spirit of the statute."

Plainly from these authorities, the language of the Illinois statute as stated in the case of *Baldwin v. City of Chicago, supra*, extends to the room where a tippling house is kept or liquor is sold or given away. In so doing, it extends to the room or rooms where any club or social organization dispenses liquors, whether to members or guests. The relationship of such an organization to its members, to whom it dispenses liquors, has been rendered free from doubt by the utterances of our Supreme Court.

South Shore Country Club v. The People, 228 Ill. 75, was an information against a corporation not for pecuniary profit organized under the general incorporation laws of this state for pleasure, social recreation and the promotion of outdoor sports, requiring it to show by what warrant it sold intoxicating liquors without a license and praying that its charter should be forfeited, etc. To this information a plea was filed showing the nature of the corporation, its objects and the circumstances and conditions under which it kept a stock of intoxicating liquors in its club house and furnished the same to its members. A general demurrer was filed to the pleas and the same sustained. The Supreme Court there reaffirmed the views expressed by it in the previous case of *People v. Law and Order Club*, 203 Ill. 127, where it was held that the dispensing of intoxicating liquors by a social club to its members, without profit, constitutes a sale, and that the fact that the club is organized in good faith for social purposes, and not as a shift or device to evade the provisions of the Dramshop Act, is immaterial. In the case last above mentioned, the court said, page 131:

"Under the general laws of the state no person has the legal right to sell spirituous liquors without a license, and by doing so a fine is incurred, which may be collected by indictment or suit. (*Kadgihn v. City of Bloomington*, 58 Ill. 229.) The Dramshop Act, which took the

place of similar legislation which has long been on our statute books, declares the business of selling intoxicating liquors in quantities less than one gallon to be criminal, except so far as it is expressly authorized and made lawful by license. (*People v. Cregier*, 138 Ill. 401.) The language of the statute is certainly comprehensive enough to include any person, natural or artificial, and any kind of a sale or device used in lieu of a sale direct. Under similar statutes much ingenuity has been expended in attempting to show that the dispensing or furnishing of liquors to members of a club by an agent of the club was not a sale, but a mere transfer of the special property of the other members to him (*Graff v. Evans*, 8 Q. B. Div. 373); was in fact only an equitable and convenient mode of distributing refreshments to its members; (*Tennessee Club v. Dwyer*, 11 Les. 452); was a delivery to the member of his part of the liquors owned by the club; (*State v. McMaster*, 35 S. C. 1); was but a distribution among the members of the club of the property that belonged to them; (*People v. Adelphi Club*, 149 N. Y. 5); was a mere division, among the members of the common stock of liquors according to a previously arranged system; (*Commonwealth v. Smith*, 102 Mass. 144.) We do not concur in these views, and having regard for the provisions of the statute of this state regulating the sale of intoxicating liquors, they can not be allowed to control cases of this character. A sale is a transmutation of property from one man to another in consideration of some price or recompense in value. (2 Blackstone's Com., 446.) It is a transfer of the absolute or general property in a thing for a price in money. (Benjamin on Sales, Sec. 1.) A sale is the passing of the title and possession of any property for money which the buyer pays or promises to pay. (*Kranvek v. State*, 38 Tex. Cr. 44.) The word 'sell' has a well known legal signification, and in the absence of anything to the contrary appearing in the statute, we must assume that it is here intended to have that signification. *Siegel v. People*, 106 Ill. 89.

"The corporation or club, being the owner of the liquor, through its appointed agent delivers it to the member of the club on his request and receives a fixed compensation in money therefor. The property in the liquor passes to and becomes vested in the individual member, and the money paid is received for and becomes the property of the corporation. (*State v. Social Club*,

73 Md. 98.) If an agent is appointed by several tenants in common to dispose of real or personal property, and he does dispose of any part thereof in exchange for money, it is none the less a sale because the party paying the money and receiving such part to his own use happens to be one of the tenants in common. (*State v. Neis*, 108 N. C. 787.) The liquor is not the property of the member before it is separated from the common mass and delivered to him under his promise to pay for it, but the property of the company. It is not the property of the member until after the delivery and appropriation of it by him to his own use. If he should clandestinely enter the club house at night and regale himself with the liquors of the club it would not be a defense to an indictment for the offense to prove that he was a member of the corporation owning the property. Such specious defenses have received no countenance except in prosecutions for the illegal sale of ardent spirits. (*State v. Essex Club*, 53 N. J. L. 99.) It has been said that while the beer was in the keg it was the common property of the society, but when a portion was withdrawn and delivered to a member of the society, upon credit or for cash, the portion so withdrawn ceased to belong to the society and became the separate property of the member receiving it, and the transaction invested him with the power to drink it himself, to give it away, to sell it or to throw it away. *Marmont v. State*, 48 Ind. 21."

It will be seen at once from the foregoing, that any distribution of liquor by a club to its members is either a sale or a gift and that in either case the room which is the place of distribution is a "place where liquor is sold or given away" and cannot under the statute be kept open on Sunday. In considering the question of whether the meeting place of a club is a tippling house within the meaning of the Georgia statute, the Supreme Court of that state said in *Mohrman v. State*, 43 L. R. A. 398, at p. 401:

"In this state a sale is not necessary, as has been shown, to make out the offense of keeping open a tippling house on the Sabbath. Does the statute, fairly construed, embrace within its terms a house of the character described in the present case? We think so. The statute intended that all places where persons are accustomed to congregate and drink intoxicating liquors should be

closed on the Sabbath day. The fact that liquors are furnished to 100 designated persons, and no others, makes the place where such liquors are supplied none the less a tippling house. It is still a place where men congregate for the purpose of drinking intoxicants. There is no limitation placed upon the membership of the club over which the plaintiff in error exercised a general superintendence. It is 100 now, and next year may be 500. It is not unfair to assume that some, at least of its membership, are accustomed to congregate at the club rooms on the Sabbath day for the sole purpose of procuring intoxicating drinks. To hold that such a place was not a tippling house would be doing violence to the statute, and would defeat, in a large measure, the very object for which it was enacted; that is, to prevent persons congregating and imbibing intoxicants on the Sabbath day. * * *

It will be noted that the purpose of the Georgia statute as stated by its Supreme Court is substantially the same as that of the Illinois statute and the language of that court therefore applicable to the present situation.

In connection with the discussion of the questions of the Committee on License, hereinafter set forth, it must also be noted that Section 1526 of The Chicago Code of 1911 provides that each applicant for a saloon license must execute to the city a bond, among other things conditioned as follows:

“To keep closed on Sundays all doors opening out upon any street from a bar room, or room or rooms where such saloon or dramshop is to be kept and that all windows opening upon any street from any such bar room or room or rooms, shall on Sunday, except between the hours of 1 o'clock a. m. and 5 o'clock a. m. be provided with blinds, shutters or curtains, placed and maintained in such manner as to obstruct the view from such street into such bar room or room or rooms.”

Our conclusion in reference to the questions of the Committee on License are as follows:

QUESTION A.

Can liquor be served on Sunday, where a private entertainment is given by a social organization for its members only, or a wedding party, given in a licensed amusement hall.

So far as the private entertainment given by a social organization is concerned the answer must be in the negative. The principles of the decisions in reference to clubs are applicable and the distribution of liquor among the members amounts to either a sale or a gift and the place of meeting becomes a "place where liquor is sold or given away" within the meaning of the Statute.

We see no objection to serving liquor at such a private wedding party as is indicated in the question. It is, of course, assumed that the liquor served at the wedding has been procured by the host on a week day and is not brought from a saloon or dramshop on Sunday.

QUESTION B.

A saloon consisting of one room only with a bar located at one end of the room and billiard tables and bowling alley in another part of the room with a canvas drawn over the door; Can such a saloon remain open on Sunday for the purpose of selling soft drinks and permitting the playing of billiards, pool and bowling?

No. The prohibition of the statute goes to the room in which the saloon is kept, which must be completely closed on Sunday. (*Baldwin v. City of Chicago, supra.*) The doors must also be kept closed to be in compliance with the bond required by Section 1526 of the Chicago Code.

QUESTION C.

A saloon consisting of one room only and a bar located in one end of the room and the other portion of the saloon used as a cafe; Can the saloon remain open on Sunday with a canvas drawn over the bar?

This question must be answered in the negative for the reason set forth in our answer to question B.

QUESTION D.

A saloon consisting of two or more rooms, with a billiard table and bowling alley in one room, a cafe in another, and a bar in the third, the main entrance through the bar room with a canvas drawn over the bar; Can such a saloon remain open for the purpose of selling soft drinks, doing business and furnishing orders

in the cafe and permitting the bowling alley and billiard room to do business?

In our opinion the room in which the saloon is contained must be completely closed during Sunday for the reasons set forth in our answer to Question B.

QUESTION E.

At a dance where the bar permit has been issued for Saturday night, are the guests permitted to drink what liquors may have been served before twelve o'clock?

According to the ruling of the Supreme Court of Illinois in *Baldwin v. City of Chicago, supra*, the guests must depart from the room in which is located the bar from which liquors have been served under the permit, and the same must be closed at twelve o'clock Saturday night. Of course, if there are other rooms occupied by guests who have purchased liquors in reasonable quantities before midnight and without intent of subterfuge, such liquors may be there consumed by them.

QUESTION F.

Will the sale of soft drinks be permitted from the same bar after twelve o'clock?

No. The rule in this case is the same as that stated in the answer to Questions B, C, D and E.

QUESTION G.

Can liquor be served at a private party or wedding if same is held in private home?

Yes. We assume that the liquor served has been procured by the host prior to the Sunday on which the party or wedding is held, and is not brought from a saloon or dramshop on Sunday.

QUESTION H.

Can a private club that sells liquor to its members only (without a dramshop license) during the week, keep open on Sunday and serve liquor to its members?

No. Under the ruling of our Supreme Court in the cases of *Law and Order Club v. The People, supra*, and *South Shore Club v. People, supra*, dispensing liquor to the members of a club in this manner constitutes a sale thereof and consequently such club can not keep open on Sunday its rooms where liquor is dispensed nor serve liquor to its members. If not a sale, such distribution of liquors is a gift, and these rooms are equally within the prohibition of the statute. Of course, other rooms not used for such purpose may be kept open for any proper purpose. (*Baldwin v. City, supra.*)

Very truly yours,

GEO E. CHIPMAN,
First Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

**Engineering Investigation of Traction Consolidation and
Subway Construction.**

December 18, 1915.

HON. HENRY D. CAPITAIN,
Chairman, Committee on Local Transportation.

Dear Sir:

We are in receipt of your communication of December 7th in reference to the proposed ordinance in regard to an engineering investigation of traction consolidation and subway construction. You state that there is pending before the City Council a proposed amendment to such ordinance, as printed in Pamphlet 477, which seeks to insert in Section 3 a paragraph to be known as Paragraph 10, to read as follows:

“A report on the benefits to be derived by the public by reason of through-routing of steam lines and co-ordination of surface and elevated service therewith.”

You request an opinion as to whether or not the inclusion of "Paragraph 10" might place the legality of the funds proposed to be appropriated for the work contemplated in this ordinance in jeopardy, and also if it might not be safer to provide for a separate report on the proposed amendment in a separate ordinance, indicating whether the traction fund or the corporate fund could be used to defray the expenses in connection with the work involved in such report.

In the case of *Barsaloux v. City of Chicago*, 245 Ill. 598, the court, at page 612, said:

"Our conclusion is that the city has power to acquire or construct street railways and that 'street railways' properly construed, mean elevated, surface or underground railways; that the City of Chicago may exercise this power in accordance with the traction ordinances of 1907, and may expend for such purpose either the *special traction fund* or any other available *corporate funds* belonging to the city."

Thus it is seen that the traction fund, as the ordinance now stands, can only be used for purposes related to street railways as defined in the above case.

The matter as to whether an appropriation may be made out of the traction fund of the city for an investigation such as is intended in the proposed ordinance, if the proposed amendment designated as Paragraph 10 is adopted in connection therewith, resolves itself into a question of whether or not a steam railroad and a street railway are regarded as synonymous in the contemplation of the law.

In the case of *Harvey v. Aurora & Geneva Railway Company*, 174 Ill., page 295, the court at page 307 said:

"There is a wide and well understood difference between a railroad organized for general traffic, and a street, horse or dummy railroad. * * * A street railroad, as is well understood, is a road constructed on a street or highway for the purpose of conveying passengers living upon or having business on such street or highway; its main object being to accommodate street travel. For this purpose the cars make frequent stops to take on and discharge passengers along the street or highway."

Similar reasoning is adopted in the following cases:

Hartshorn v. Illinois Valley Traction Co., 210 Ill. 609.

Wilder v. Aurora, etc., Traction Co., 216 Ill. 493.

In the case of *Hartzell v. The Alton, Granite & St. Louis Traction Company*, 263 Ill., at page 207, the court said:

“Street railways embrace all such railroads as are operated upon public streets for the purpose of conveying ordinary passengers, with hand-baggage, from one place to another on the street.

* * * * *

“The main test is, that street railways are used for local convenience and street travel.”

In view of the test above mentioned that “street railways” are railways used for “local convenience and street travel,” and the Supreme Court in *Barsaloux v. City, supra*, having already construed “street railways” to mean “elevated, surface or underground railways,” it does not seem improbable that if a “steam line” became a part of a unified system of street railways, it would be regarded by that court as a “street railway.”

In this connection it must be noted that in an opinion of the corporation counsel, dated February 3, 1915, (Opinions of the Corporation Counsel Oct. 6, 1914 to April 26, 1915, p. 306) it was held that the traction fund might be used for the establishment of passenger omnibus lines although such lines were not street railways. It was there said, page 308:

“The Supreme Court, in discussing the question whether the city could use the traction fund for acquiring or constructing subways, said, at page 611:

“‘Section 24 of the traction ordinance provides that the city shall deposit fifty-five per cent of the net earnings of the traction companies to the credit of a separate fund, to be kept and used for the purchase and construction of street railways by said city. *Under this ordinance* clearly the city would have no power to divert this fund to general corporate purposes, but using it to construct subways is not a diversion of such fund.’

“While it may be considered as settled by the decision in the Barsaloux case that under the 1907 ordinances as originally passed and as they now stand the

traction fund can not, without further action by the City Council, be used for any purpose except the purchase and construction of street railways, the question remains as to whether the provision of the ordinances, in respect to the use of the fund, restricts the city for all time to the use specified in the ordinances, or whether the language used amounts only to a declaration by the city of its purpose and intent, at the time the passage of the ordinances, in respect to the use of the fund, leaving the city free at any time thereafter, by appropriate action, to abandon and change its original purpose and intent in respect to said fund, as expressed in the declaration in the ordinances, and to apply and use the fund for another purpose, such as the establishment of passenger omnibus lines."

* * * * *

"These words indicate clearly that it was the intention of the City Council (in the paragraph of the ordinances in respect to what should be done with the traction fund) merely to declare the views entertained by it at that time in regard to what was the most desirable use for the fund, but that such declaration was 'subject to the action of the City Council' and that the City Council intended to and did reserve to itself the right at any time by action on its part to direct that the fund be used for another purpose if, in the judgment of the City Council, future developments should make it inexpedient, unwise and impossible to use the fund for the purchase and construction of street railways by the city."

We agree with the conclusion of the opinion above quoted from, that the traction fund is under the control of the City Council, which is not limited to the purpose declared in the Ordinance of 1907; and while this view has not as yet had the approval of the courts, it seems clear that it should have such approval whenever litigated. However, it is of course safer to provide for the proposed Paragraph 10, by embodying it in a separate report and ordinance, as suggested in your letter.

Yours very truly,

JOHN A. COOKE,

Approved: *Assistant Corporation Counsel.*

SAMUEL A. ETTELSON,
Corporation Counsel.

**Authority of a Police Officer to Serve Notice on a Juvenile
Between the Ages of 17 and 21 When Found Violating
Ordinances of the City.**

December 18, 1915.

HON. CHARLES C. HEALEY, General Superintendent of Police.

Dear Sir:

The question of the authority of a police officer to serve notice on a juvenile between the ages of 17 and 21 as outlined by your inquiry is governed by several sections of the statutes and one section of the city ordinances.

Section 340 of Chapter 38, Hurd's Revised Statutes of 1911, provides:

“340. DUTY OF OFFICERS.) §2. It shall be the duty of every sheriff, coroner, constable and every marshal, policeman, or other officer of any incorporated city, town or village, having the power of a sheriff or constable, when any criminal offense or breach of the peace is committed or attempted in his presence, forthwith to apprehend the offender and bring him before some justice of the peace, to be dealt with according to law; to suppress all riots and unlawful assemblies, and to keep the peace, and without delay to serve and execute all warrants, writs, precepts and other process to him lawfully directed.”

Section 68 of the Cities and Villages Act provides:

“In all actions for the violation of any ordinance, the first process shall be a summons: Provided, however, that a warrant for the arrest of the offender may issue in the first instance upon the affidavit of any person that any such ordinance has been violated, and that the person making the complaint has reasonable grounds to believe the party charged is guilty thereof; and any person arrested upon such warrant shall, without unnecessary delay, be taken before the proper officer to be tried for the alleged offense. * *”

Section 83 of the Cities and Villages Act provides:

“The trustees in villages, the mayor, aldermen, and the marshal and his deputies, policemen and watch-

men in cities, if any such be appointed, shall be conservators of the peace, and all officers created conservators of the peace by this act, or authorized by any ordinance, shall have power to arrest or cause to be arrested, with or without process, all persons who shall break the peace, or be found violating any ordinance of the city or village, or any criminal law of the state, commit for examination and, if necessary, detain such persons in custody over night or Sunday in the watch house or any other safe place, or until they can be brought before the proper magistrate, and shall have and exercise such other powers as conservators of the peace as the city council or board of trustees may prescribe. * * *

Section 299 of the Cities and Villages Act relating to the arrest and imprisonment of persons violating any ordinance of the several cities and villages in this State, provides.

“That in all actions for the violation of any ordinance of any city or village organized under any general or special law of this state, the first process shall be summons: Provided, however, that a warrant for the arrest of the offender may issue in the first instance, upon the affidavit of any person that any such ordinance has been violated, and that the person making the complaint has reasonable grounds to believe the party charged is guilty thereof; and any person arrested upon such warrant, shall, without unnecessary delay, be taken before the proper officer, to be tried for the alleged offense. * * *

Section 1937 of The Chicago Code of 1911, provides as follows:

“The several members of the police force of the city when on duty shall devote their time and attention to the discharge of the duties of their stations according to the laws and ordinances of the city *and the rules and regulations of the department* to preserve order, peace and quiet and enforce the laws and ordinances throughout the city. They shall have power to arrest all persons in the city found in the act of violating any law or ordinance, or aiding and abetting in any such violation and shall arrest any person found under circumstances

which would warrant a reasonable man to believe that such person had committed or is about to commit a crime.”

All of the foregoing provisions, to be properly interpreted, must be read in connection with Section 49 of The Municipal Court Act, which provides:

“§ 4. Any police officer of the City of Chicago may arrest on view any person who may be seen by said police officer in the act of violating within the City of Chicago any ordinance of said city, or any ordinance of any municipal corporation situated in whole or in part within the limits of said city whenever such violation is by such ordinance made punishable by fine or otherwise. Any person so arrested shall, without unnecessary delay, be taken by such officer to some convenient branch of the Municipal Court and such police officer shall thereupon make and file a complaint in writing under oath against such defendant of the violation by such defendant of such ordinance, and such defendant shall thereupon be dealt with according to law in the same manner as if he had been arrested in the first instance upon a warrant lawfully issued.”

Section 340 of Chapter 38 heretofore referred to, is the only provision which seems to make it mandatory upon police officers and others enumerated or mentioned in said section to arrest violators and forthwith bring them before a justice.

The offenses enumerated in Section 340 are, “any criminal offenses or a breach of the peace.” The term “breach of the peace” is a generic term, which includes riotous and unlawful assemblies and affrays, forcible entry and detainer, wanton discharge of firearms in public streets, or so near the chamber of a sick person that it will cause injury, the sending of challenges to a duel, provoking a fight, the going armed in public without lawful occasion in such a manner as to alarm the public, and many other acts of a similar character. (*People v. Bartz*, 19 N. W. 161, 53 Mich. 493.)

When this section is read in connection with Sections 68, 83 and 299 of the Cities and Villages Act, it can reasonably be seen that the Legislature did not intend to make

Section 340 cover the offenses enumerated in the other sections. Sections 68 and 299 provide that a summons shall be the first process in all cities for the violation of city ordinances.

Section 83, which in substance covers the matter referred to in Section 340 of Chapter 38, provides that the officer shall have power to arrest or cause to be arrested, with or without process, all persons who shall break the peace or be found violating any ordinance of the city or village. This section would seem to vest a discretion in the police officer as to whether it would be advisable to arrest without process or to wait until process was had and then arrest. The summons herein referred to is a summons issued out of and under the seal of a court and is not the summons contemplated by your proposed order, which reads as follows:

“Chicago, Ill.,191..

“Name

Address

You are hereby notified to appear in the Municipal Court Room.....City Hall on the..... day of.....A. D. 191.. to answer to the charge ofin violation of the city ordinance in such cases made and provided. Said violation is alleged to have been committed on...., 191...

Unless you appear as notified, application will be made to the court for a warrant or capias for your arrest.

.....Patrolman

Star No..... Prect.....

Approved:

General Superintendent of Police.”

The foregoing summons submitted by you is an informal notice for the defendant to appear in court to answer the charge of any violation of the city ordinance. The effect of this notice would be a mere request to the offender to come and avoid the necessity of arrest after process had been issued.

Section 1937 of The Chicago Code of 1911, heretofore quoted, provides that they (police) shall have power to arrest all persons in the city found in the act of violating any law or ordinance, or aiding and abetting in any such violation, and shall arrest any person found under circumstances which would warrant a reasonable man to believe that such person had committed or is about to commit a crime.

Section 1918 of The Chicago Code of 1911 vests in the General Superintendent of Police power to make rules and regulations for the guidance of the subordinate officers and members of his department. The proposed order, dated December 13th, from the general superintendent directed to the commanding officer, would, in my opinion, be a rule or direction within the power granted to him under Section 1918, because it is an aid to said subordinate officers to help them in determining a discretionary power, that is, when offenders seen violating such ordinances should be immediately apprehended. I do not think that the serving of this notice is a putting under arrest, in that the policeman does not take the party to be notified in charge. The notice herein contemplated is in substance a notice to appear in court on the following day, or that, in case of default therein said policeman will cause the court to issue a warrant for his arrest.

I am, therefore, of the opinion that the order contemplated herein, in so far as it relates to the violation of city ordinances, would be a valid order, but that if said order were to be carried beyond the violation of ordinances, it would be in conflict with the provisions of Section 340 of Chapter 38 of the Revised Statutes.

Yours very truly,

GEO. A. CURRAN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTTELSON,
Corporation Counsel.

Sunday Closing Law Observance at Clubs.

December 18, 1915.

HON. CHARLES C. HEALEY, General Superintendent of Police.

Dear Sir:

We reply to various questions in respect to the Sunday Closing Law submitted by yourself and others, as follows:

QUESTION No. 1.

Can an incorporated legitimate club serve intoxicating liquors on a Sunday to its members and guests when same were purchased previous to Sunday and paid for from treasury of club?

Can said club under same conditions serve liquors to its members only?

Serving intoxicating liquors in the manner mentioned in the question amounts to a dispensing or distribution thereof by the club, and under the decisions of the Supreme Court of this state is either a sale or a gift. The room where such dispensing or distribution takes place becomes a "place where liquor is sold or given away" under the terms of the statute and must not be kept open on Sunday. It makes no difference whether the distribution is to members or guests.

QUESTION No. 2.

The saloon proper is separated from the rear portion of the premises by a solid wall, with a doorway leading into the same. The rear consists of three or four rooms, with an entrance upon the street. Will you kindly inform me whether it would be contrary to law for an owner to run a cafe in the rear rooms, and to keep the same open on Sundays, providing he keeps the door leading into the saloon closed and locked?

It is only necessary to securely close the saloon proper so that no access may be had to it on Sunday. The business of the cafe may go on in the separate rooms. (*Baldwin v. City of Chicago*, 68 Ill. 418.) By the saloon proper is meant the room or rooms described in the dramshop license.

QUESTION No. 3.

Will you please render to the Department of Health an opinion as to the legality of issuing licenses to restaurants running in connection with saloons where said restaurants can be shut off from the saloon and be reached through a separate entrance without any connection with the room wherein liquors are sold?

The answer to this question is the same as that to Number 2.

QUESTION No. 4.

A club running under a charter five years old has been advised by some one that liquors purchased on Saturday by the members as a whole may be consumed on Sunday or any other day. Please advise me whether the plan pursued by the club, whereby liquor is consumed on Sunday, is a violation of the Sunday Closing Law?

Such conduct is a violation of the law. See answer to question No. 1.

QUESTION No. 5.

Certain singing societies have been accustomed to giving entertainments consisting of concerts followed by dancing in a hall rented for the afternoon or evening together with ante rooms adjoining. Refreshments are served consisting of sometimes a supper, other times a light lunch, at which beer, wine and cigars are dispensed. The refreshments are purchased in the first instance by the society, and are by it served, the society employing waiters for that purpose. The serving of all refreshments is directly under the supervision of a member or members of the society. It is customary for the representatives of the society to make the charge for the refreshments served, the waiter collecting and turning the moneys over to the cashier of the society. All refreshments are paid for by the consumer, and after having paid the expenses of the entertainment, the balance realized is distributed by the society for charitable and educational purposes. It is customary to charge a fee to all admitted. Rarely are the refreshments served from a bar outside of the hall or ante rooms, or from a regular public bar, and the entertainments are conducted under special bar permits. May beer and wine be served at such entertainments given on Sunday?

No. See answer to question No. 1.

QUESTION No. 6.

I conduct both a saloon and a cigar stand. The cigar stand is located in the front part of the saloon and is separated from the bar by a partition and is in full view from the street. The Sunday Closing Law necessitates the closing of the front door which leads into the store, thereby closing both the cigar stand and the saloon. Will it be within the law to keep the cigar stand open Sunday?

If the place where the cigar stand is kept is a separate room so that the room in which the saloon is located can be securely and completely closed on Sunday, the cigar stand may be kept open and the saloon closed. (*Baldwin v. City of Chicago, supra.*) If, however, the door to the cigar stand is also the door to the saloon, such door must be kept closed on Sunday in order to avoid liability upon the bond given by you under Section 1526 of The Chicago Code of 1911, and you cannot keep the cigar stand open. See answer to question No. 2.

QUESTION No. 7.

If any organization is formed wholly for fraternal purposes and the only benefits derived from the dues paid in, are social benefits, would such organization be a violation of aforesaid law, if beer was purchased from the fund and distributed to the members of such organization on Sunday afternoon provided the beer was purchased on another day than Sunday?

Such distribution would be a violation of the Sunday Closing law. See answer to question No. 1.

QUESTION No. 8.

If the members of such organization as mentioned in Question No. 7, had lockers in which they kept beer, and they met in club rooms of such organization and drank the beer that they purchased before Sunday, would this be a violation of the law?

It may be possible that if each member purchased his liquors on a week day and placed them in a locker at the

club rooms, he may take the same from the locker and partake thereof on Sunday. If, however, there is any treating on Sunday, or the locker system is merely a method for the distribution of liquors by the club on Sunday, it would amount to a trick, artifice or subterfuge, and would not be tolerated by the law.

QUESTION No. 9.

May I let the boys play a game of pool or cards and cover my bar, giving them admission by the side door on Sunday?

If the pool and card tables are in the same room with the bar, such room must be kept closed on Sunday. Merely covering the bar will not be a sufficient compliance with the law. See answer to Question 2.

QUESTION No. 10.

I am the owner of a saloon and hall in the rear of same, and there is an incorporated pleasure and benevolent association which has been assembling in said hall in the past, holding weekly meetings, and previous to the enforcement of the Sunday Closing Law its members have been in the habit of having cigars and refreshments served during and after said meetings. I would like to know if I can allow said association to consume their refreshments as in the past, provided doors to saloon proper are closed. This meeting hall has no windows in the partition between hall and saloon, and doors are entirely of wood, making it an impossibility to see into saloon when doors are closed?

The association cannot distribute among its members on Sunday, liquors which have been purchased on week days. See answer to Question No. 1.

QUESTION No. 11.

We want to know if a man has a saloon with a back room where he has pool tables or where he feeds people, can he close it with a blind door that cannot be opened and serve drinks that were sold on Saturday to his customers and also use the pool tables and play cards?

He cannot serve drinks that were sold on Saturday, but may, if the room in which the saloon is contained, is properly closed make any proper use of the other room. Serving drinks in the manner indicated is merely completing a sale commenced on a week day and is a violation of the law.

QUESTION No. 12.

In case the saloonkeeper should have a restaurant license and have it O. K.'d by the Health Department, can he sell drinks on Saturday and have them served on Sunday?

See answer to Question No. 11.

QUESTION No. 13.

Could a club be organized and incorporated and each fellow have his own box in which he could put stuff on Saturday night and drink it at the club on Sunday?

See answer to Question No. 8.

QUESTION No. 14.

A corner saloon has its front facing on one street and runs back along an intersecting street. Immediately in the rear of this saloon is a store which the proprietor has rented for the purpose of conducting a cafe. This store is connected with the saloon by a door which can be closed and locked. If this door, between the store and saloon proper is closed and locked on Sunday, may the proprietor sell cigars and soft drinks in the store and allow his customers to play cards for innocent amusement?

If the door between the store and saloon proper is securely closed, the store may be used by the proprietor on Sunday for any proper purpose.

QUESTION No. 15.

Can a restaurant and cafe, having a dramshop license, operate as follows:

We would issue to the purchaser of intoxicants (members of such society only) to be consumed during their meetings, viz., 8 to 12 p. m. Sundays an order

showing such purchase and the date thereof, keeping a duplicate order in a book, set aside such purchase labeled so as to show the name of the purchaser and deliver intoxicants so purchased on presentation of such order. Such goods to be kept in a place not connected with the bar or barroom?

This method of operation would constitute a violation of the law. See answer to Question No. 11.

In connection with the answers to these questions, please refer to our opinion of even date to Hon. John Siman, city clerk, a copy of which is enclosed herewith for your information.

Yours very truly,

GEORGE E. CHIPMAN,

First Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Lobbying in the Council Chamber.

December 20, 1915.

HON. OTTO KERNER, Chairman, Judiciary Committee.

Dear Sir:

On November 29, 1915, the following opinion was rendered by this department:

“November 29, 1915.

To the Honorable the City Council
of the City of Chicago.

Gentlemen:

At the meeting of your body held November 22, 1915, an order was passed as follows:

‘Ordered, That the corporation counsel present an opinion at the next regular meeting of the City Council interpreting the last sentence of rule eight of the rules of the council, which reads as follows: “Lobbying shall not be permitted.” ’

Complying with the order set forth, we beg to advise you that lobbying is defined by the Century Dic-

tionary to be the influencing of official action, or the solicitation of votes in a legislative body.

We are of the opinion that the latter meaning is the one that is applicable to the last sentence of rule eight of the council rules, and that, correctly interpreted, the sentence means that the soliciting of votes in the City Council shall not be permitted.

Respectfully submitted,

JAMES G. SKINNER,
Assistant Corporation Counsel.

Approved:

GEORGE E. CHIPMAN,
Acting Corporation Counsel."

Under date of December 8, 1915, the city clerk, in a letter to the corporation counsel, refers to your committee as follows:

"The committee desires a further opinion from your office which will explain more explicitly whether 'the soliciting of votes in the City Council' means the council chamber, the ante-room, the council committee rooms or somewhere outside, which opinion the committee will be pleased to have for consideration, if possible, at its next meeting occurring December 13, 1915."

The rules of a deliberative body are intended for its guidance and control while in session as such body. In *Heiskell v. Mayor*, 65 Md. 125, the court says: "These rules operate nowhere except in the legislative hall of the body that adopts them." Let us consider the context in which the sentence "Lobbying shall not be permitted" is found in Rule 8, also the language and intent of the first forty rules of the City Council. These rules refer to the conduct of the business of the City Council as a body, and, where place is concerned, certainly must have reference to the room or chamber in which its business is carried on.

Rule 5 refers to the council chamber. The first sentence of Rule 8 specifies who shall be admitted within the bar of the City Council chamber. Rule 9 provides for clearing the chamber in case of disturbance or disorderly conduct. Rule 10 prohibits smoking in the council chamber during the session. Rule 14, while a member is speaking, forbids

any member to hold private discourse or to pass between the speaker and the chair. Rule 16 provides that no member shall be allowed to leave the council while in session, unless excused by the presiding officer. "Council" is here used in the sense of the room in which the body is sitting. There is nothing that I have been able to find in the context of the first forty rules which seems to indicate that any of them, where they may be said to refer to a place, have reference to any other place than the council chamber. Neither do I find anything in the remaining rules of the City Council that indicates or tends to show that the last sentence of Rule 8 is intended to have meaning or application to any other place than the council chamber.

I am accordingly of the opinion, that the sentence "lobbying shall not be permitted," in its present context has application to the council chamber during the session of the council and to no other place. If it had been the intent of the City Council to give it a wider meaning, it would have been very easy to have expressly so provided in its present context or at some other place in the rules.

Very truly yours,

JAMES G. SKINNER,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Confirmation of Appointments.

December 20, 1915.

TO THE HONORABLE THE MAYOR AND THE CITY COUNCIL OF
THE CITY OF CHICAGO.

Gentlemen:

In obedience to your order of the 10th inst., published on pages 2524 and 2525 of the Printed Journal of the Proceedings of the City Council, instructing the corporation counsel to furnish your honorable body with an opinion as

to whether it requires a majority vote of all sitting members of the City Council to confirm the appointment of members of the Board of Education and other appointments requiring confirmation by the City Council, I have the honor to submit the following:

It is provided by Section 128 of "An Act to establish and maintain a system of free schools," approved and in force July 12, 1909, as follows:

"In cities having a population exceeding 100,000 inhabitants the Board of Education shall consist of twenty-one members, to be appointed by the mayor, by and with the advice and consent of the Common Council, seven of whom shall be appointed for the term of one year, seven for the term of two years, and seven for the term of three years. At the expiration of the term of any member of said board, their successor shall be appointed in like manner and shall hold their office for the term of three years. Any vacancy which may occur shall be filled by the appointment of the mayor, with approval of the Common Council for the unexpired term."

It is also provided by Section 1 of Article 3 of "An Act to provide for the incorporation of cities and villages," approved April 10, 1872, in force July 1, 1872, as follows:

"The City Council shall consist of the mayor and aldermen."

And, by Section 8 of said article, it is provided that:

"A majority of the aldermen elect shall constitute a quorum to do business, but a smaller number may adjourn from time to time, and may compel the attendance of absentees, under such penalties as may be prescribed by ordinance."

And, by Section 12 of said Article 3, it is provided that:

"It shall keep a journal of its own proceedings."

And Section 13 of the same article provides that:

"The yeas and nays shall be taken upon the passage of all ordinances, and on all propositions to create any liability against the city, or for the expenditure or appropriation of its money, and in all other cases

at the request of any member, which shall be entered on the journal of its proceedings; and the concurrence of a majority of all the members elected in the City Council shall be necessary to the passage of any such ordinance or proposition: Provided, it shall require two-thirds of all the aldermen elect to sell any city or school property.”

All of the foregoing acts apply to and are in force in the City of Chicago.

It will be seen from the foregoing that the power to appoint members of the school board and all city officers when not otherwise provided is lodged in the mayor, but in order to make an appointment effective the advice and consent of the City Council must be had by an affirmative act.

This brings us to the question, what is an affirmative act of the City Council, consisting of the mayor and aldermen? It means and must mean an act by the majority of a quorum. And what is a quorum? A quorum is a majority of the aldermen elect, as is provided by Section 8, as above stated.

The city council is empowered to transact all business and do all things imposed upon it by a majority of a quorum, a quorum being present, and is restricted only in such matters as is provided in Section 13 above set forth. In construing Section 13, the Supreme Court of Illinois says, in the case of *McLean v. City of East St. Louis*, 222 Ill. 510, at page 514:

“The law requires that the yeas and nays shall be taken upon the passage of all ordinances, and the concurrence of a majority of the legislative body is necessary to their passage. We recognize that construction of the statute in *Hibbard & Co. v. City of Chicago*, 173 Ill. 91. If a proposition not in the form of an ordinance creates any liability or provides for the expenditure or appropriation of money, the requirement is the same, *while as to other propositions, whether the yeas and nays are entered upon the journal or not, the majority of a quorum is sufficient.*”

See also *Launtz v. The People*, 113 Ill. 137, and the case of *U. S. v. Ballin*, 144 U. S., page 1, wherein the court, in

construing the provision of the United States Constitution which provides that a quorum of each house shall be sufficient *to do business*, says, on page 6:

“The other branch of the question (quorum) is, whether, a quorum being present, the bill received a sufficient number of votes; and here the general rule of all parliamentary bodies is that, when a quorum is present the act of a majority of the quorum is the act of the body. This has been the rule for all time, except so far as in any given case the terms of the organic act under which the body is assembled have prescribed specific limitations.”

And, on page 8, it is said by the court:

“For, according to the principle of all the cases referred to, the quorum possesses all the powers of the whole body; a majority of which quorum must, of course, govern. The Constitution of this State and the United States declare that a majority shall be a quorum to do business; but a majority of that quorum is sufficient to decide the most important question.”

Our conclusion is, that in no case does it take more than a majority of a quorum of the aldermen-elect to advise and consent to an appointment of the mayor.

Respectfully submitted,

EDWARD J. SMEJKAL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Contract for the Removal of Dead Animals.

December 20, 1915.

TO THE HONORABLE, THE CITY COUNCIL OF THE CITY OF
CHICAGO.

Gentlemen:

Pursuant to the order passed by the City Council at the meeting held December 10, 1915, as shown on page 2522 of the printed Council Journal of said date, we herewith sub-

mit an opinion regarding the legality of the now existing contract between the Canal Melting Company (referred to in said order as the Canal Rendering Company) and the City of Chicago, relating to the disposition of carcasses, and particularly as to whether or not such contract includes the right to remove carcasses from the city dog pound.

We have examined the above mentioned contract and find that it was properly executed on the 13th day of August, 1912, to continue in force for a period of five years from said date.

Under Section 1485 of The Chicago Code of 1911, the mayor and commissioner of health are authorized and empowered to enter into a contract for the removal of dead animals for a period of not less than one nor more than five years, if by such contract the city is required to make no expenditure of money for or on account of such removal of such dead animals. Under the conditions of the existing contract, the city is not required to expend any money, but on the contrary, the contractor is required to pay to the city the sum of one hundred and twenty-five dollars, in annual installments of twenty-five dollars each. The contract having been executed under authority of the ordinance of the City of Chicago, it is a valid and binding contract, both upon the city and the Canal Melting Company.

Under the terms of the contract, the Canal Melting Company is given the right to receive within the City of Chicago and to remove from any street, avenue, alley or other public place in said city, outside of the area occupied by the Union Stock Yards and Transit Company, and from any railroad depot, right-of-way and car in said city, and from the Chicago River, its branches, its docks and slips within said city, and from any barn, stable or private premises within said city, and to appropriate and convert to its (Canal Melting Company's) use, all the right, title and interest which the City of Chicago may have in and to any and all dead animals larger than a common rat (except domestic fowl) abandoned and left upon any such public or private places within the City of Chicago; provided, however, that

this shall not include the right to remove or receive carcasses of animals intended for human consumption, which have been condemned or confiscated by the food inspectors of the Department of Health or the Federal Government.

This language would tend to the conclusion that the Canal Melting Company could appropriate and convert only such carcasses as were abandoned and left upon any such public or private places within the City of Chicago, or such as the commissioner of health would notify him to remove as provided by another clause of the contract.

By Section 773 of The Chicago Code of 1911, authority is given the pound-keeper to destroy dogs impounded by him under stated conditions. The Century Dictionary construes the term "destroy," as applied to man and animals, to mean "to kill; slay; extirpate."

In the case of *People v. Christy*, 20 N. Y. Supp. 278, 65 Hun 349, the court held that under Penal Code, Section 654, relating to injuries against property and prescribing the punishment for unlawfully destroying another's property, one who poisons the horses of another may be prosecuted for destroying property.

It would therefore appear that the killing of an animal would be a destruction of such animal at the dog-pound, and the disposition of the carcass a matter to be determined by the city.

Under the contract with the Canal Melting Co., the city grants and awards to the contractor all the city's right, title and interest in and to the dead animals abandoned and left on the public streets, alleys, public grounds, etc., and from any barn, stable and private premises.

The provision of the contract does not give the contractor the right to take any carcass from public or private places except such as are abandoned and left in such place and would thereby become a menace to public health. The owner of the dead animal could dispose of the carcass in any manner he saw fit not in conflict with the ordinances of the city. After the destruction of an animal by the pound-keeper, the city could also make such disposition of the car-

cass as it saw fit. It could abandon and leave the carcass and through the Board of Health notify the contractor to remove the same; or it could make any disposition of such carcass or carcasses that a private owner could make.

Our conclusion is that as a matter of right, the contractor has no authority to remove carcasses from the dog-pound, but can only perform that service upon proper notice from the city.

Very respectfully,
EDWARD H. WRIGHT,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Power to Compel Board of Education to Observe Fire Prevention Ordinances.

December 20, 1915.

HON. THOMAS O'CONNOR, Fire Marshal.

Dear Sir:

In response to the request of the chief of the Bureau of Fire Prevention and Public Safety for advice as to what steps he can take to compel the Board of Education to comply with the ordinances which it is his duty to enforce, we submit the following:

This inquiry opens up the question of the right of the city to enforce its police ordinances against other governmental agencies within its territory, a question that frequently arises but has never been decided in an authoritative manner. The subject has in fact several times been brought up in this department with reference to the Board of Education in the enforcement of building ordinances, smoke prevention ordinances, etc. These matters have in each instance in the past been adjusted otherwise than through suit, and the board has usually, after more or less pressure was brought to bear through correspondence or

other means, yielded to the reasonable demands of the department heads. We suggest that the same methods might lead to favorable results in regard to matters now in controversy.

As indicated above, there is some uncertainty as to the law on the subject. The Board of Education has been held for some purposes to be a department of the city government, while with reference to other matters it has been regarded as an arm of the state and not subject to municipal control. If the Board of Education were to be regarded purely and simply as a branch of the state government it is doubtful whether the city could enforce its fire prevention ordinances against it. We state this on the authority of *Kentucky Inst. for Blind v. City of Louisville*, 8 L. R. A. (N. S.) 553, decided November 21, 1906, although the editor of the volume cited states in a note thereto that careful search has failed to disclose any other case as to the duty of a state institution to comply with municipal building regulations. The court in that case says:

“* * * The principle is that the state, when creating municipal governments, does not cede to them any control of the state’s property situated within them, nor over any property which the state has authorized another body or power to control. The municipal government is but an agent of the state, not an independent body. It governs in the limited manner and territory that is expressly, or by necessary implication, granted to it by the state. It is competent for the state to retain to itself some part of the government even within the municipality, which it will exercise directly, or through the medium of other selected and more suitable instrumentalities. How can the city ever have a superior authority, to the state over the latter’s own property, or in its control and management? From the nature of things it can not have.”

Kentucky Inst. for Blind v. Louisville, 8 L. R. A. (N. S.) 553.

We are convinced, however, that the Board of Education of this city does not come within this rule. A careful consideration of the decisions of our Supreme Court

brings us to the conclusion that so far as the status of its members and the exercise of its governmental functions as to the direction of the schools are concerned it is to be regarded as a branch of the state government, while in the management of its fiscal affairs, the control of its property, the status of its employes and its amenity to the police powers of the city it is to be regarded as a part of the city government.

As to the particular point under consideration, our opinion with reference to the Board of Education, as well as all other municipal corporations and quasi-municipal corporations co-extensive with or located within the city, is that the state has created them for certain specific purposes which the city cannot interfere with, but that the police powers of the city extend over the entire territory of the municipality and can be enforced in all cases where there is no conflict with the statutes granting the special powers and imposing the special duties referred to. To illustrate, the various park boards have authority to pass ordinances relating to the proper use and regulation of the parks and boulevards within their jurisdiction, but this authority cannot be understood as putting an end to the police jurisdiction of the city at the boundary line of a park so that the city is unable to enforce its police powers within the park. So far as they do not conflict with the power of the park board concerning the use and regulation of same all the police ordinances of the city are in force within such park. This we believe is the only reasonable view, since if that were not the case a park which is open to the public could be used for the purpose of violating many salutary provisions of the law which are not included either within the statutes or the park board's ordinances.

Under former charters the Board of Education was a part of the city government. By the passage of the School Act of 1872 and the adoption of the Cities and Villages Act this was changed. The status of the Board of Education has been defined from time to time since then, but never in such a way as to make it entirely independent of the city government.

In *Fuller v. Heath*, 89 Ill. 296, it was held that the two new statutes did not modify or impair former special laws which do not conflict with the provisions of same.

In *Brenan v. People*, 176 Ill. 620, the court held that for certain purposes, among them the enforcement of the Civil Service Law, the Board of Education is to be regarded as a department of the city government. The same view is expressed in *People ex rel. Post v. Healy*, 231 Ill. 614, and in *People ex rel. Cameron v. Flynn*, 265 Ill. 414.

In the case of *People ex rel. Biddison v. Bd. of Ed. of Paris Union School District*, 255 Ill. 568, where the school district in question was a quasi-municipal corporation clothed with powers by a special act of the Legislature, the court held that it was "created and continued only for school purposes, and not for the purpose of exercising the ordinary functions of government."

In *McGurn v. Board of Education*, 133 Ill. 122, the court says, on page 134:

"Nor is the repugnancy between the functions of these two classes of corporations established by the fact that, by our present School Law, the charge and control of schools in cities having over 100,000 inhabitants is committed to a board of education, an organization which, in some points of view, is to be regarded as a subordinate department of the city government, and in others, as an independent municipal corporation. Such distribution of municipal powers simply shows that in the judgment of the Legislature a board of education is the best instrumentality for taking charge of and maintaining a system of free schools within the city, and not that the same functions might not constitutionally have been committed directly to the city."

McGurn v. Board of Education, 133 Ill. 122.

The language above quoted seems to leave no room for argument on the point that the police powers relating to the structures and the sanitary condition of the buildings in which the schools are maintained remain in the city government. It would, be an anomalous situation if the City Council, which is charged with the duty of enacting laws for the preservation of life and health, were shorn of all power

to enforce ordinances designed for the safety of the children of the community.

Paraphrasing the language of the court in *People ex rel. Biddison v. Bd. of Ed. of Paris Union School District*, 255 Ill. 568, it may be said that among the "ordinary functions of government" on the part of the city is the duty to enact ordinances relating to fire prevention and public safety in schools. The Board of Education is bound to observe valid ordinances duly enacted tending to promote these ends.

As to the mode to be adopted, if all reasonable demands fail, the writ of mandamus will certainly lie; and it may be that the ordinary method of enforcing ordinances by prosecution for a penalty can be resorted to.

In the case of *People v. City of Chicago*, 256 Ill. 558, it was held that the city could be prosecuted criminally for failing to observe the Woman's Ten-hour Law. In our opinion, the same rule which permitted the state to enforce its police enactments against the city will permit the city to enforce its police ordinances against a governmental body clothed with limited powers in its own jurisdiction.

We therefore recommend that you proceed to enforce the ordinances by making the usual demands. If they are not complied with it would be well to take up the matter with the president of the Board of Education before going farther; but if no results can be obtained in that way a statement ought to be prepared and submitted either to the mayor or to the City Council setting forth in detail the violations that you are trying to overcome. This department will be ready to act when directed to do so either by the mayor or by the City Council.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTTELSON,
Corporation Counsel.

Appropriation for Bonds of Treasurer and Employes.

December 21, 1915.

HON. EUGENE R. PIKE, City Comptroller, Chicago, Illinois.

Dear Sir :

You referred to this department copy of a letter from the city treasurer in which he calls attention to the fact that certain bonds which he takes from employes in his office run to him. He states that it is therefore necessary that the appropriation for these items should be placed under the control of the city treasurer, and you ask for an opinion as to whether it is incumbent on the City Council to appropriate separately for the premiums on bonds of that office as a part of the expense of the city treasurer.

We see no reason why a separate appropriation should be made for this purpose for the city treasurer any more than for the commissioner of public works or any other officer who is required to take bonds from his subordinates. The matter is entirely within the discretion of the City Council and it can appropriate for the premiums to be paid for such bonds in such manner as it sees fit.

When The Chicago Code of 1911 was enacted no reference was made to bonds of surety companies, so far as bonds of city officers or employes were concerned. The original Section 1642 required that bonds of all officers should be executed with two or more sureties, and Section 1644 provided that the officer who is required by ordinance to take such bond shall examine the sureties touching their sufficiency. At a later date (July 22, 1912, Printed Journal p. 1621) Section 1642 was amended so that officers and employes who gave bonds were required to execute same with two or more sureties or have the same subscribed by a surety company authorized to do business in the State of Illinois, and it further provided that premiums on all bonds subscribed by surety companies should be paid by the city.

While the enactment of this new provision in some degree modified the provisions of Section 1644 which required

the officer taking the bond to examine the sureties, nevertheless, there might have been some reason for continuing to interpret Section 1644 as applying to all official bonds whether signed by an individual or by a surety company.

However, on June 1, 1915 (Printed Journal, p. 415), Section 1642 was again amended and an amendment was made to Section 1643. By these amendments it was provided that where an accredited surety company went on such bond only one surety was necessary and such surety company was not required to justify or file any schedule.

The effect of these last amendments was to render nugatory the provision above referred to in Section 1644 under which the duty devolved on the officer who took the bond to examine the sureties. Section 1644 must now be read in connection with the two amended sections preceding same and can only be understood as referring to cases where an officer takes a bond that is subscribed by individuals and not by an accredited surety company. Hence, the point that the city treasurer makes to the effect that he is bound to examine into the sufficiency of the bond and, therefore, should have entire control of the matter, is not good. He is required to do this only in case he takes bonds signed by individuals. The provision relating to the taking of such bonds from his assistants and clerks is identical with similar provisions in regard to other officers. The mere fact that, under the statute, he, like the comptroller, clerk and collector, is responsible for the fidelity of all persons appointed by him, does not operate to place him in any different situation than other officers charged with like responsibility.

It was held in *People v. Loeffler*, 175 Ill. 585, that the provisions of the Civil Service Act modified the section of the statute which imposed this responsibility, and it cannot be said that he assumes any greater responsibility by reason of accepting surety companies on bonds than he assumes by employing assistants and clerks named by the Civil Service Commission.

The City Council has seen fit, in lieu of distributing the expense for bonds among the different departments, to group them under one head and appropriate for same

under the heading of miscellaneous items appropriated for the comptroller's office. This was undoubtedly done in view of the fact that the comptroller's duties are such that he must keep in touch with the condition and standing of surety companies that execute bonds. This manner of appropriating is not peculiar to this subject. The same thing is done with regard to rents of buildings for the different departments, payment of petty injury and damage claims, refunds, etc., workmen's compensation claims and telegrams of the various departments. Appropriations for other items not directly under the supervision of the department of finance are also made in this way, as for instance, that for the Art Commission and the purchase of works of art by local talent, for the payment of personal injury claims under the direction of the city attorney, etc.

As stated above, this is a matter which the City Council can regulate as it sees fit. If it decides to make appropriations for premiums for bonds for the different departments separately, it may do so, but we see no reason why it must be done.

Our conclusion, therefore, is that the method pursued by the City Council in the past is entirely within the law and may be followed in the future if desired.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTIELSON,
Corporation Counsel.

Longwood Drive Lighting.

December 21, 1915.

HON. WILLIAM G. KEITH, Commissioner of Gas and Electricity.

Dear Sir:

You submitted to us a proposition made by certain residents of Longwood Drive with reference to the lighting of that thoroughfare, concerning which you ask two questions:

The plan outlined, in brief, contemplates that, since no funds of the city are available for the purpose of installing a lighting system on Longwood Drive between 95th street and 107th street, certain residents desire to make such installation in conformity with the system to be installed in that district later by the city, in case the city will operate the lamps through the means of the general appropriation for street lighting.

The first question you ask is whether your department would be acting within the scope of its authority if it entertained such a proposition.

We are of the opinion that you would be going beyond your authority if you made such a contract without council action. It is entirely within the power of the City Council to enter into such an arrangement if it sees fit. A precedent was in fact established several years ago when it made a somewhat similar contract with a number of business men interested in the better lighting of Dearborn street, although in that case the ordinance took the form of a grant and the grantees were required to maintain the system. (See Printed Journal, Nov. 4, 1912, pp. 2200-2201.)

Without appropriate council action, however, you would have no right to bind the city to an agreement to light the system after it is installed, and it is at least doubtful whether you would be justified in permitting the installation. The authority of the commissioner of public works and the commissioner of gas and electricity is sufficient to permit the tearing up of streets here and there for purposes of repair and isolated installations in accordance with the general ordinances, but it is hardly broad enough to enable them to permit the installation of a system along the street for a mile and a half.

Your next question is whether, if the plan was adopted, the amount expended by the residents of the street could be refunded at a later time.

This is also within the control of the City Council if it assumes a part of the burden at the start. Its powers with relation to street lighting are ample, and it could

make a contract for an improvement of this kind, to be paid for in installments, if it saw fit, provided an appropriation for the current year's work precedes the making of the contract. The statutes do not permit the City Council to bind its successors so far as salaries, supplies, etc., are concerned, but allow work to be begun on a public improvement during one fiscal year to be finished during succeeding years if an appropriation for the current year's work has been made before the contract is entered into. The contract under which The Sanitary District of Chicago installed the present lighting system is a contract of this kind.

It is doubtful whether a future City Council could be bound for the entire expense of installation. But if the residents along the street were willing to take the chance of a future purchase by the city without attempting to bind it by a contract, the payment by the city at a future time would be lawful. It is true the ordinances at the present time authorize a system of water pipe extension somewhat similar to what is proposed, but the law with respect to the maintenance and extension of the water system is susceptible of more elasticity than that which relates to other corporate expenditures.

Our answer to your questions, therefore, are as follows:

You would be going beyond your authority if you undertook to bind the city by a contract to light the street in question upon the installation of a lighting system by the residents, although the City Council could do this if it deemed it expedient.

The City Council could make an agreement to refund the expense of installation to the residents if it assumed some part of the initial expense and appropriated for same before the contract is entered into.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTIELSON,

Corporation Counsel,

Distribution of Prizes by Chance on Merchandise Checks.

December 21, 1915.

HON. C. C. HEALEY, General Superintendent of Police.

Dear Sir:

We have your letter of the 9th inst., with enclosure of a report from William Wragg, detective sergeant, 12th precinct, in which you ask for an opinion as to whether or not the advertising scheme of the Sixty-third Street Business Men's Circle is in violation of law.

The communication of Sergeant Wragg states that a number of business men in the vicinity of Sixty-third street and Cottage Grove avenue, who have associated themselves together for the purpose of advancing the interests of that locality, give with every 10-cent purchase at their stores a check upon which is printed a number, and that on February 1, 1916, it is planned to give an automobile and other articles to persons possessing the checks having the winning numbers. These numbers are to be determined at the old Empress Theatre by requesting the audience to call out numbers which will be marked down on a blackboard and, when there are six rows of numbers having six figures each, drawing a line diagonally between opposite corners. The device is illustrated by the following diagram, and the winning number would be in this case 148013:

1	5	4	6	8	7
4	4	2	3	5	0
6	7	8	9	6	5
4	3	0	0	2	2
7	4	3	2	1	1
8	9	6	4	5	3

(148013).

We beg to advise you that the scheme above mentioned is a lottery and falls within the provisions of Section 985 of The Chicago Code of 1911 and Section 180 of The Criminal Code (Hurd's Revised Statutes, Chapter 38).

Section 985 of The Chicago Code of 1911 is, in part, as follows:

“No person shall sell, offer for sale, vend, barter, exchange, give away, deal in or in any way dispose of or redeem any ticket, order slip or device of any kind for or representing any number of shares or any interest in any lottery, policy or scheme of chance of any kind or description by whatever name, style or title **the same may be denominated or known**, and whether located or to be drawn, paid or carried on within or without the limits of the City of Chicago, or whether such purported drawings be real or imaginary.”

Section 180 of The Criminal Code is as follows:

“§180. Whoever sets up or promotes any lottery for money or by way of lottery disposes of any property of value, real or personal, or under pretense of a sale, gift or delivery of any other property, or any right, privilege or thing whatever, disposes of, or offers or attempts to dispose of any real or personal property with intent to make the disposal of such real or personal property dependent upon or connected with any chance by dice, lot, numbers, game, hazard or other gambling device, whereby such chance or device is made an additional inducement to the disposal or sale of said property, and whoever aids, either by printing or writing, or is in any way concerned in the setting up, managing or drawing of any such lottery, or in such disposal, or offer or attempt to dispose of property by any such chance or device, shall, for each offense, be fined not exceeding \$2,000.”

A lottery is defined as “a scheme for the distribution of prizes by chance.”

Elder v. Chapman, 176 Ill. 142, 150.

Thomas v. People, 59 Ill. 160, 163.

Dunn v. People, 40 Ill. 465.

Many cases have arisen which have involved schemes of the nature of the one under consideration, and it has become well established by the courts that they constitute lotteries. It is apparent that the plan of the Sixty-third Street Business Men's Circle comes within the above definition of a lottery, for prizes are to be distributed and the procedure by which the winning numbers are selected in-

volves all the elements of chance. The feature that the purchasers who receive the checks in question act with the primary object of securing merchandise and that the checks are obtained as a mere incident of such purchase does not relieve the scheme of its objectionable character, for the checks are given for the purpose of stimulating trade and they form a part of the consideration in any case where the patron receives them. And the fact that the merchandise purchased by anyone receiving checks in question is itself worth the money paid by the purchaser is also immaterial.

In the case of *Thomas v. People*, 59 Ill. 160, the court, in commenting upon a scheme whereby for the sum of \$5 a person might purchase a copy of a steel plate engraving and tickets of admission to certain concerts and lectures at which "presents" were to be awarded to certain persons determined by chance, said:

"Even if the ticket to the concerts and lectures, and an engraving, were intrinsically worth \$5, the scheme would still be a lottery. The hand bill advertisement delivered with each ticket held out inducements to purchase."

Numerous other cases might be cited to sustain the principle that where as an inducement to the purchase of merchandise a purchaser is offered the possibility of winning a prize by chance, there are present the elements necessary to constitute a lottery. It has been held that, where, in order to induce subscription to a newspaper, tickets are offered which may entitle the subscriber to a prize, the scheme is a lottery.

State v. Mumford, 76 Mo. 647.

Where, as an inducement to the purchase of tickets to a public exhibition, the tickets have numbers printed thereon which may entitle the holder to presents, there is a lottery.

State v. Shorts, 32 N. J. L. 398.

Ex Parte Blanchard, 9 Nevada, 901.

There is a lottery also where prizes are offered as in-

ducements to the purchase of municipal or government bonds.

U. S. v. Zeisler, 30 Fed. 499.

Horner v. U. S., 147 U. S. 449.

In the latter case, the court said:

“In law the term ‘lottery’ embraces all schemes for the distribution of prizes by chance, such as policy-playing, gift-exhibitions, prize-concerts, raffles at fairs, etc., and includes various forms of gambling.”

The court further states:

“Whoever purchases one of the bonds, purchases a chance in a lottery, or, within the language of the statute, an ‘enterprise offering prizes dependent upon lot or chance.’ The element of certainty goes hand in hand with the element of lot or chance, and the former does not destroy the existence or effect of the latter. What is called in the statute a ‘so-called gift concert’ has in it an element of certainty and also an element of chance; and the transaction embodied in the bond in question is a ‘similar enterprise’ to lotteries and gift concerts.”

Our conclusion is, therefore, that the scheme operated by the Sixty-third Street Business Men’s Circle is a violation of both the statutes and city ordinances which prohibit lotteries.

Very truly yours,

RALPH G. CRANDALL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTIELSON,

Corporation Counsel.

Solicitation or Coercing of the Passing Public by Storekeepers.

December 22, 1915.

TO THE HONORABLE, THE CITY COUNCIL OF THE CITY OF
CHICAGO.

Gentlemen:

At a recent meeting of your honorable body an order was passed directing the corporation counsel to render an

opinion "as to the possibility of legislating against store-keepers soliciting or coercing the passing public to enter their shops or places of business for the purpose of making sales." (See Printed Journal of November 22, 1915, p. 2265.)

In response to this request for information, we beg to say that the Legislature has delegated to the City Council powers as to the regulation and control of public streets, which are to all intents as broad as the Legislature itself possesses. The Legislature's power may be said to be limited only by the right of the public to use the street for purposes of public travel and the right of free speech on same.

"The primary and paramount use of the streets is public travel for man and beast, and carriage for goods; and this use everyone enjoys upon terms of equality with others."

28 Cyc. 907.

Among the powers delegated to the municipality by Section 1 of Article V of the Cities and Villages Act are the following clauses:

"Ninth: To regulate the use of the same (streets).

"Eighteenth: To regulate and prohibit the exhibition or carrying of banners, placards, advertisements or handbills in the streets or public grounds, or upon the sidewalks.

"Twentieth: To regulate traffic and sales upon the streets, sidewalks and public places."

Power is also given to the city by the forty-third clause to license, regulate, tax and restrain runners.

Under the authority thus given, the city has ample power to restrict the use of the streets to the legitimate purposes of traffic and to prevent any such thing as coercing or extreme solicitation amounting to more than ordinary persuasion.

In pursuance of this authority, the City Council has from time to time passed ordinances which restrict merchants and others from abusing their privileges on the streets. If such regulations are not sufficient to meet the conditions

that exist, it may be possible to go even farther than it has done, by defining the word "runner" so as to include storekeepers and their agents who are importunate in their efforts to induce people on the streets to enter their stores.

Aside from the ordinances that have been passed regulating the use of streets, there is now in force a section of the code which is designed to prevent the abuses mentioned in the order recently passed. We refer to Section 2008, which was amended on May 5, 1913 (Printed Journal, p. 316), and again amended on July 30, 1913. (Printed Journal, p. 1999.) By this section, persons are prohibited from making noises by means of crying, calling or shouting, or by means of a whistle, rattle, bell, etc., for the purpose of advertising goods, wares or merchandise, or of directing attention or inviting the patronage of persons on the street.

We are of the opinion that this ordinance goes far towards preventing such forcible persuasion or coercion as is indicated in the order to which we have referred. If this is not the case, however, and if abuses exist which are not within the terms of this ordinance, we have no doubt that such conditions can be remedied by an amendment thereto or by the passage of a new ordinance aimed at the particular abuse.

Yours respectfully,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:
SAMUEL A. ETTELSON,
Corporation Counsel.

Treasurer's Petty Cash Fund.

December 22, 1915.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

Your letter, in which you ask for an interpretation of Section 65 of The Chicago Code of 1911 concerning the treasurer's petty cash fund, was referred to the undersigned for consideration and reply.

This section provides for a fund to be known as the treasurer's petty cash fund for the purpose of enabling the treasurer to pay in cash such warrants as may be presented to him for payment in cash, and the mayor and comptroller are authorized to draw warrants for such amounts as may, in their judgment, be sufficient to meet the daily demand for that purpose, payable to the city treasurer.

You state that a custom has grown up in the treasurer's office which is being followed by the present city treasurer by which the treasurer makes withdrawals from the active bank on checks signed by himself to which no warrants signed by the mayor and comptroller are attached, and you ask whether that method of drawing money for the purposes of such fund is legal.

The wording of the section in question is perfectly plain and there can be no doubt about the method to be pursued. Warrants for this purpose should be drawn in the usual way, signed by the mayor and countersigned by the comptroller, payable to the city treasurer.

The reason why the practice that you referred to came into vogue is readily understood when you take into consideration the unsettled state of the law in this respect until the matter was finally decided in the case of *People ex rel. Cameron v. Flynn*, 265 Ill. 414.

Section 5 of Part II of the act known as "The Little Charter," which related to the designating of city depositaries and the matter of handling the city's funds, contained the following sentence at the end of same.

"When money is once deposited in such depository or depositaries, no check or draft shall be drawn against such deposit unless accompanied by a warrant attached thereto, drawn in accordance with the provisions of Article VII of the act above referred to by its title, a duplicate of said warrant to be retained by the treasurer."

The particular provision of Article VII referred to in the above sentence is contained in Section 11, which reads as follows:

“All warrants drawn upon the treasurer must be signed by the mayor and countersigned by the clerk, stating the particular fund or appropriation to which the same is chargeable, and the person to whom payable; and no money shall be otherwise paid than upon such warrants so drawn, except as hereinafter provided.”

It was always a matter of doubt whether it was proper after once depositing money in a city depositary to draw any portion of it out for any other purpose except for the payment of a voucher drawn against a particular appropriation. Nevertheless, in order to keep within the law and still meet the conditions created by the new method of selecting depositaries, Sections 64, 65 and 66 of the code were enacted. In both Sections 65 and 66 provision is made for drawing money out of the active bank, otherwise than for the payment of warrants drawn against a particular appropriation. To meet this situation, Section 64 was drafted in such a way that the deposit in the active bank might be regarded as a temporary deposit and not subject to the rigid rule which prohibited the withdrawing of funds only on warrants drawn against an appropriation previously made. This method was looked upon as a compliance, as nearly as could be arrived at, with the requirements of the statutes. As a result of this uncertainty, however, the treasurer came to regard the deposit in the active bank as sufficiently under his control to authorize him to draw checks against it for the purposes of the petty cash fund. It was never done in strict accordance with the ordinance, but was acquiesced in because, if the point had been urged against the treasurer, he would very likely have raised the question of the validity of both Sections 65 and 66.

All doubt as to the propriety of the method devised by the City Council has been removed by the Supreme Court as a result of its decision in the case above referred to. The court said in this case, at page 425:

“To meet such conditions as these the Legislature has vested in the City Council full power and authority

to designate as many depositaries as it deems necessary and proper for the best interests of the city. This authority expressly granted carries with it, as an incident to that power, full power and authority to fix and determine the amount to be deposited with each depositary and to prescribe all necessary rules and regulations for carrying the power thus expressly granted into full force and effect. (28 Cyc. 262, 263; *Gundling v. City of Chicago*, 176 Ill. 340.) In the exercise of its discretion the City Council of Chicago designated seventy-two banks as city depositaries, and by ordinance fixed the maximum amount which might be deposited in any one depositary and prescribed the rules and regulations which should govern the comptroller and treasurer in making such deposits. In our judgment the provisions of Sections 64 and 66 of the ordinance in question do no more than prescribe such rules and regulations and are fully authorized by the provisions of the statute hereinbefore set forth. They are also fully authorized by the provisions of Section 20 of Article 7 of the Cities and Villages Act, which confer power and authority upon the City Council to provide and establish such additional rules and regulations for the collector, treasurer and all other officers connected with the receipt and expenditures of the corporate funds as it shall deem proper, which provisions, as pointed out above in referring to Section 5 of Article 12 of the same act, would be wholly meaningless unless they had reference to the prescribing of rules and regulations regarding the deposit of the city's corporate funds."

People ex rel. Cameron v. Flynn, 265 Ill. 414.

It will thus be seen that the court has sanctioned the interpretation put upon the statutes by the City Council and by the same token that Section 66 is valid, we must understand that Section 65 is also valid and authorizes the procedure in strict accordance with the wording of the said section. This wording cannot be misunderstood. It states explicitly that warrants should be drawn for the purposes of the treasurer's petty cash fund by the mayor and comptroller payable to the city treasurer.

Since the law is settled with regard to all of these matters, it follows that the ordinances ought to be strictly complied with.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Status of Employees in Office of Oil Inspector.

December 22, 1915.

CIVIL SERVICE COMMISSION, City of Chicago.

Gentlemen:

In reply to your inquiry as to the status of all employees in the office of the oil inspector and what employees in that office, if any, are exempt from the provisions of the Civil Service Law, we submit, that in order to determine the above question we must necessarily consider the source of authority by virtue of which the office was created and the intention of the Legislature regarding the regulation and control of the same.

In the case of *City of Chicago v. Burke*, 226 Ill., at page 204, the court said:

“The subject of oil inspection is under the control of the Legislature, and they may direct such inspection or delegate the power to municipalities. Whatever power was given to cities by the general incorporation act for the inspection of oil, was taken away when the Legislature resumed control of the subject by the Act of 1874.”

In view of the above opinion, we must conclude that the office of oil inspector is not a city office of the kind and character which the municipality might create under the powers contained in its charter or the Cities and Villages Act, and, that the power of the municipality to establish

the same is dependent upon such powers as may be expressly conferred by act of the Legislature.

On July 1, 1915, the oil inspection act of 1874, and the amendments thereto, was expressly repealed and an act entitled, "An Act in relation to oil inspection," approved June 29, 1915, became in force; and whereas said office is undoubtedly existent by virtue of the powers conferred by said act, we believe that the rule of construction, as follows:

"that a special act will control, although there may be provisions found in a general act which, but for the provisions of the special act, would include the subject matter covered by the provisions of the special act,"

is applicable in this instance and that the matter of appointments to said office and the term and tenure of the appointees, should be construed in conformity with the provisions of said act, which reads in part as follows:

"That the mayor of any city, with the approval of the City Council, the president of the board of trustees of any village or incorporated town, with the approval of such board of trustees, may appoint one or more inspectors for the inspection of coal oil, petroleum, naphtha, gasoline, benzine, mineral seal, signal and other mineral oils or fluids, fix the compensation of such inspectors and prescribe the fees to be paid by those for whom such inspectors render services. The county judge of any county may appoint such inspectors for territory not within city limits, village, or incorporated town, fix their compensation and fees. Every such inspector shall hold office for one year, and until his successor is qualified, and with the approval of the power appointing him, may appoint deputies, for whom he shall be responsible, who shall take the same oath and be liable to the same penalties as the inspector."

The provisions of the above act relative to the appointment of one or more inspectors appear to us to be clear and explicit in their terms and said appointment or appointments are manifestly within the exceptions noted in Section 11 of the Civil Service Act, in that said appointment or appointments are among those "whose appointment is subject to confirmation by the City Council."

In the case of *People v. Kipley*, 171 Ill. on page 85, the court said:

“We are inclined to the opinion that, if any member of any principal department of the city is an official whose appointment is made by the mayor subject to confirmation by the City Council, he is not to be included in the classified service, notwithstanding he may not be made the head of the department.”

In view of the above we are of the opinion that the appointment by the mayor, as provided in said act of one or more inspectors is a legal appointment and in nowise subject to the provisions of the Civil Service Act.

The express language of said act relative to the appointment of deputies appears to us to clearly determine the manner in which the same may be appointed, and in this instance, we must conclude that the approval mentioned therein must necessarily mean the approval of the mayor, for undoubtedly the power to appoint such inspector who may appoint deputies is expressly conferred upon the mayor under the preceding provisions of said act. In view of the foregoing, we are of the opinion that each and every appointment of a deputy under the provisions of said act must be approved by the mayor, as a condition requisite to the legality of the same.

While no mention is made in the above act as to the manner in which removals may be made, it is a well established rule of law that the power to appoint to an office or position where the term or tenure is not defined carries with it the power of removal. It might be contended that the power of appointment of such inspector being qualified, the power of removal was qualified, and we might give this question further consideration if it were not that said act further provides that

“every such inspector shall hold office for one year and until his successor is qualified.”

It is well understood that an officer can exercise no greater powers than the express powers conferred upon him, and such other powers as are reasonably necessary to the

proper exercise of such express powers and those essential to the objects and purpose for which the office was created. Therefore it necessarily follows that under the provisions of this act the appointment of a deputy by such inspector, in the manner prescribed, would be an appointment only for and during the term of the officer making the appointment, and that the term of office of each and every deputy so appointed would terminate and expire on and at the expiration of the power by virtue of which he received his appointment. It is beyond question that, under the provisions of this act, an inspector so appointed would be responsible for only such deputies who held office under his predecessor as he might elect to reappoint for and during his term of office.

It can be readily perceived that the foregoing provision of said act is in direct conflict with the Civil Service Act; that it would be impossible to adapt the same to the provisions of the Civil Service Act, and would defeat the purposes for which the Civil Service Act was enacted.

In view of the foregoing it is noteworthy that, notwithstanding the provisions pertaining to appointments contained in the act of 1874, and the subsequent amendments thereto, were in direct contravention to the Civil Service Act, no attempt was made by the Legislature when the act now in force was enacted, to provide that the appointments mentioned in said act were to be made in conformity with the Civil Service Act, or indicate by means of the language employed in said act that such was the intention.

In the case of *McGann v. The People*, 227 Ill. 567, the court, in holding that the appointment of deputy clerks of the Municipal Court is not governed by the provisions of the Civil Service Act, because the Municipal Court Act expressly provided otherwise, at page 567, said:

“Section 14 of the Municipal Court Act provides that there shall be elected a clerk of said Municipal Court, whose term of office shall be six years; and Section 15 thereof provides ‘that said clerk shall appoint such number of deputies as may be determined, from time to time, by a majority of the judges of the Mu-

nicipal Court,' and that 'any deputy clerk shall be subject to removal at any time by an order signed by a majority of the judges of the Municipal Court and spread upon the records of said court.' This language indicates so clearly that the deputy clerks of the Municipal Court of Chicago are to be appointed by the clerk of said court, and said deputy clerks, when appointed, are to be under the control of the judges of said court, that the statute is not open to construction. The courts cannot disregard the plain language of a statute, and it is their duty to accept it as they find it and enforce it as it is plainly written. (*Ottawa Gas Light and Coke Co. v. Downey*, 127 Ill. 201; *City of Chicago v. McCoy*, 136 *id.* 344.) And if there were a conflict between the provisions of the Civil Service Act and the Municipal Court Act, the provisions of the latter law having been enacted into law subsequent to those of the Civil Service Act, the Municipal Court Act would necessarily control. It is also a rule of construction that a special act will control although there may be provisions found in a general act which, but for the provisions of the special act, would include the subject matter covered by the provisions of the special act. Here the Municipal Court Act provides that the clerk of the Municipal Court shall appoint such number of deputies as may be determined, from time to time, by a majority of the judges of the Municipal Court, and that such deputy clerks shall be subject to removal at any time by a majority of the judges of said court. To undertake to read into said statute the provision that the clerk of said court should appoint said deputies in accordance with the provisions of 'An Act to regulate the civil service of cities,' would be for this court to legislate upon the subject of the appointment of deputy clerks of the Municipal Court, which this court is powerless to do."

A careful comparison of the provisions contained in the Oil Inspection Act and the opinion of the Supreme Court as above set forth, discloses that the reasoning of the court as applied in the above case would apply with equal force to the matter in question.

In summarizing the foregoing we must conclude that the office of oil inspector is an office which partakes of the character and nature of a state office, the duties of which,

although exercised within defined territorial limits, concern the general public rather than the municipality exclusively, and that, by reason of the various provisions relative to the inspection of oils and the office of oil inspector enacted into law by the Legislature subsequent to the enactment of the Civil Service Act, the Legislature has clearly manifested its intention to retain control of the same and determine the manner in which said office may be created and appointments made thereto; and in view of the foregoing and the apparent irreconcilable inconsistency between the provisions of the Civil Service Act and the provisions relative to the appointment and tenure of deputy inspectors contained in the Oil Inspection Act, we are of the opinion that the appointment of a deputy or deputies, made in the manner provided in said act in relation to oil inspection, is a valid and legal appointment.

In reference to the appointment of a stenographer, we are of the opinion that the legal status of the same must be determined by the manner in which the appointment was made and the character and nature of the authority conferred by virtue of said appointment; whereas, if the appointment was made in the manner prescribed in said Oil Inspection Act and the one so appointed was acting as a deputy inspector in the performance of such duties as might be assigned to him or her by said inspector, we are of the opinion that the provisions of the Civil Service Act would not apply to the same; but the provisions of the latter act would undoubtedly apply to an appointment in said office where the person appointed is acting as an assistant or employe only and, in the rendition of his or her duties, is not performing the same in the capacity of a duly appointed deputy inspector.

Yours very truly,

H. C. FOSTER,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Cigarette License for Wholesale Tobacco Store.

December 23, 1915.

HON. CHARLES J. FORSBERG, City Collector.

Dear Sir:

Your communication of December 21, 1915, together with letter of Best & Russell Company, a corporation, wholesale and retail tobacconist, dated at Chicago, December 20, 1915, addressed to the city collector, requesting the opinion of the corporation counsel "as to whether it will be necessary for Best & Russell Company to secure a cigarette license for their wholesale tobacco store located at No. 535 South Wabash avenue, Chicago (it being admitted by Mr. E. Simpson, treasurer of Best & Russell Company, that cigarettes are sold to retailers and others from said wholesale store by Best & Russell Company), in addition to the twenty-eight cigarette licenses for the twenty-eight retail tobacco stores owned and operated by said Best & Russell Company in the City of Chicago," we beg to say:

Sections 728, 729 and 730 of The Chicago Code of 1911 provide as follows:

"728. LICENSE—APPLICATION—FEE—BOND.) Any person or corporation desiring a license to sell cigarettes or cigarette papers or wrappers in the city shall make written application for that purpose to the mayor, in which shall be set forth the full name of the applicant and the location at which such sales are proposed to be made. Such application shall be accompanied by evidence that the applicant, if an individual, and the person or persons in charge of the business, if a corporation, is or are persons of good character and reputation, and if the mayor shall be satisfied that such persons are of good character and reputation and are suitable persons to be intrusted with the sale of cigarettes, he shall cause the city clerk to issue a license to such applicant upon the payment to the city collector of a license fee at the rate of one hundred dollars per annum; (and upon such applicant executing a bond to the city with sureties to be approved by the mayor, in the sum of five hundred dollars, conditioned that the licensed person

or corporation shall faithfully observe and obey all laws of the State of Illinois and ordinances of the city, now in force or which may hereafter be passed with reference to cigarettes); provided, however, that nothing herein contained shall be held to authorize the sale of cigarettes containing opium, morphine, jimson weed, belladonna, strychnine, cocaine, or any other deleterious or poisonous drug or drugs.

"Such license shall authorize the person or corporation therein named to expose for sale, sell or offer for sale cigarettes and cigarette papers and wrappers at the place designated therein.

"729. INSPECTION—ANALYSIS.) It shall be the duty of the commissioner of health, and he is hereby authorized and empowered, from time to time to inspect and examine all places where cigarettes are licensed to be sold within the city, with a view of ascertaining whether the laws of the State of Illinois and the ordinances of the city, in relation to the sale of cigarettes, are being complied with at such places, and it shall be his duty to cause all such laws and ordinances to be rigorously enforced; and it shall be the duty of all persons or corporations licensed to sell cigarettes within the city, upon demand of the commissioner of health, to furnish to said commissioner for his inspection samples of all cigarettes sold or offered for sale by them, which samples of cigarettes shall be analyzed by or under the direction of said commissioner of health, and a record of such analysis shall be made and kept in his office for the inspection of the public.

"730. SALE WITHOUT LICENSE—PENALTY.) Any person who shall hereafter keep for sale or give away any cigarettes or any cigarette papers or cigarette wrappers of any kind, at any place within the city, without having first procured the license as above provided, shall be fined not less than twenty-five dollars and not exceeding two hundred dollars for the first offense, and a further penalty of twenty-five dollars for each day such person persists in such violation after a conviction for the first offense."

It is our opinion that it is necessary for Best & Russell Company to file an application for a cigarette license, and to have the license issued to it by the City of Chicago for its wholesale store located at No. 535 South Wabash avenue,

authorizing the sale of cigarettes in compliance with the ordinances herein referred to.

Yours very truly,

EDWARD J. SMEJKAL,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Rights of Railroad Company as to Switchtrack.

December 23, 1915.

HON. WILLIAM R. MOORHOUSE, Commissioner of Public Works.

Dear Sir:

Under date of October 28, A. D. 1915, this office furnished you an opinion as to whether the Chicago, Burlington & Quincy Railroad Company is entitled to a permit to lay a switch track in Lumber street under the ordinance passed by the City Council October 4, 1886, and accepted October 18, 1886, published in the book of special ordinances of 1898 on page 431, in view of the fact that the ordinance was passed twenty-nine years ago, or whether the company should have elected as to the number of tracks they desired to install within a reasonable length of time after the passage of the ordinance, in which we called your attention to an investigation made in reference to frontage consents under the statute, and we said that "unless the railroad company can show that it has complied with that statute, it has no rights in the street, etc."

For the purpose of showing this department that the frontage consents have been secured, we have been furnished with an affidavit signed by John McConnell, who has been a resident of Chicago for over fifty years, showing that prior to the passage of the ordinance of 1886, his brothers, George, Benjamin F. and he, were owners of property on the street in question; that he is familiar with the ordinance and

that his brothers, he and a majority of the owners signed the frontage consents. He goes into an elaborate discussion of the matter showing clearly that he knows what he is talking about.

In discussing the purport and effect of ordinances passed by City Councils and thereafter published, as was done in 1898, by authority of the City Council of Chicago in a volume entitled "special ordinances," our Supreme Court in the case of *The People ex rel. v. Maxon, et al.*, 139 Ill. 306, at page 310, says:

"Our statute provides that when city or village ordinances are printed in book or pamphlet form, purporting to be published by authority of the board of trustees or City Council, such book or pamphlet shall be received as evidence of the passage and legal publication of such ordinances, as of the dates mentioned in such book or pamphlet, in all courts and places, without further proof. (Rev. Stat., Sec. 4, Chap. 24.) Certainly respondents and all others had a right to act on that which relators had made legal evidence of the passage of the ordinance, which they now seek to treat as invalid."

The Superior Oxygen Company of Illinois, under date of December 14, 1915, writes this department as follows:

"The location of our business on Lumber street was largely determined by the fact that we would be able to make use of the switch track in question, and we have already suffered considerable loss through delay in setting in this track in accordance with the ordinance granted to the C. B. & Q. Railroad, in regard to all of which we had fully informed ourselves."

This ordinance received considerable publicity prior to and at the time of its passage, and we believe it is a fair presumption that if the frontage consents did not accompany the ordinance, the same were filed either with the commissioner of public works or the city clerk, before the company commenced to build a track under it.

Therefore, in view of the affidavit in our possession, the Supreme Court decision above referred to, the publishing of the special volume of ordinances, and the statement

of the Superior Oxygen Company of Illinois relying on this ordinance as published, this department advises you to disregard our former opinion and to issue the permit in question and any others that may come up, with reference to Lumber street from the intersection thereof with the right of way of the Joliet & Chicago Railroad Company, southwesterly as far as said street is laid out.

Yours very truly,

ANTON T. ZEMAN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Automatic Vending Machine.

December 27, 1915.

HON. CHARLES C. HEALEY,

General Superintendent of Police.

Dear Sir:

We have your letter dated December 17th with enclosure of a communication from Brady and Rutledge, attorneys, in which you ask for an opinion relative to the legality of Automatic Cashier and Discount Machines, owned by the Almy Manufacturing Company.

When the machines in question are operated by inserting a nickel and pulling a lever they become illuminated, pictures, moving automatically, appear in rotation and music plays. The person operating the machine, moreover, receives a trade check which will entitle him to five, ten, fifteen or twenty-five cents worth of trade or merchandise. Upon the front of the machine four glass signs appear with the following inscriptions: "5c buys 5c worth Mdse.," "5c buys 10c worth Mdse.," "5c buys 15c worth Mdse.," "5c buys 25c worth Mdse." The machines are so constructed that, if the electricity is turned on, one of these signs will always be illuminated and will indicate to persons

operating them the amount of trade or merchandise which the trade check, received on the next play, will entitle them to. In other words, persons operating these machines will, in each case, receive a check worth at least five cents in trade or merchandise, although it may be worth more, and they know in advance, unless the signs above mentioned are not illuminated, the value of the check that will be received.

Another feature of these machines is that they are so adjusted that the plays on which checks of the value of five, ten, fifteen or twenty-five cents respectively will be received are regulated and fixed, and upon the side of the machines are two discs from which a person who is familiar with their use may ascertain the value of the trade checks which will be obtained upon any number of successive plays. These discs occupy an inconspicuous position, however, and would often not be seen by persons operating the machines. Moreover, unless the operation of these discs is explained, their use or purpose would not be understood. It is therefore conceivable, and it may be presumed, that many persons operate the machines in question without knowing that there is a device by which they may ascertain the value of the trade checks that they will obtain by successive plays.

It will be seen from the above that the machines under consideration have a number of the features of the gum-vending machines which were discussed in an opinion rendered by this department on December 10th. We there stated that the fact that upon each play the operator of these machines was sure to secure the value of his money, did not necessarily render them lawful devices and cited the following cases which supported that view:

Lang v. Merwin, 99 Me. 486.

In re Cullinan, 99 N. Y. S. 1097.

Lytle v. State, 100 S. W. 1160, (Tex.).

Meyer v. State, 112 Ga. 20.

And we further held that although persons operating those machines were informed in advance how many trade checks

they would obtain as the result of any play, nevertheless the device lent itself to the practice of "staking" money on a chance of winning through successive plays trade checks having a money equivalent in excess of the amount used in operating the machine, and in any case where the machines were found to be so used, they would fall within the classification of gambling devices and would be subject to the prohibitory ordinances of the city.

We are of the opinion that Automatic Cashier and Discount Machines *may* be used for gambling purposes. For example, if the glass signs previously mentioned are not illuminated so as to indicate what value the trade checks will have which will be obtained upon the next operation of the machine, a person operating it would not know whether he would obtain a trade check worth five, ten, fifteen or twenty-five cents. It follows that an element of chance would be present which would make the machines gambling devices, subject to seizure and destruction by the Police Department.

If the signs are illuminated and persons operating the machines know in advance what the value of the trade check will be on any play, and we understand that this is the customary method of operation of the machines, it would nevertheless be possible to operate them successively in the hope of winning ten, fifteen or twenty-five cent trade checks. Where the person operating any machine is familiar with the use of the discs previously referred to, and ascertains in advance the value of the trade checks which he will receive upon successive plays, the element of chance is lacking and the machine in such case would not be used for gambling purposes. If, however, the existence of these discs or their use is not known to persons operating these machines successively for the purpose of winning ten, fifteen or twenty-five cents, the gambling element would be present.

We are of the opinion that the only way by which the unlawful use of these machines will be effectually eliminated is to place on the front of each machine in a conspicuous position and with clear lettering, a chart showing what the result of successive plays will be, or a card referring to the

discs and explaining their purpose and operation. As these machines are now operated, however, it is safe to assume that in a large number of cases the persons operating them have no knowledge of or are not familiar with the discs in question and therefore operate them successively in the hope of winning ten, fifteen or twenty-five cent trade checks. When it is observed that these machines are used for this purpose, they fall within the provisions of Section 984 of The Chicago Code of 1911, and may be seized and destroyed as provided in Section 983. We may add that where a person who has started a machine in motion delays the insertion of another nickel until the music stops and the pictures cease moving, it can not be shown that his purpose in operating the machine is unlawful, but where several nickels are inserted at once and the lever is then pressed down successively, or where nickels are inserted and the lever pressed down several times in succession when the music is already playing, the elements of gambling may be assumed to be present, provided, as before stated, the operator is not familiar with the use of the discs and is not informed what the result of successive plays of the machines will be.

Our attention has been called to the case of *The Yale Wonder Clock Company v. Surman*, decided by the New York Court of Appeals, which is relied upon as an authority sustaining the legality of these machines. That suit was brought to recover the agreed price of a machine sold by the plaintiff to the defendant. The defense was made that the machine was a gambling device, but the court overruled this contention and allowed the plaintiff to recover. That decision, however, merely holds that the machine is not *per se* an illegal device, and does not pass upon the question whether or not the machine *may* be used for gambling purposes, and thus become illegal.

Our conclusions therefore are:

(1) If these machines are operated without having illuminated the signs which, when so lighted, indicate the value of the trade check that will be obtained upon any

play, they will fall within the classification of gambling devices.

(2) If the signs in question are illuminated, nevertheless the machines are used for gambling purposes and may be classed as gambling devices when they are operated successively, with a view to winning trade checks in excess of the amount used in operating the machines, by persons who are not familiar with the use of the discs and do not know the value of the trade checks which will be obtained through successive plays.

Very truly yours,

RALPH G. CRANDALL,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

**Authority of City over Fences Shutting off Access
to the Lake.**

December 27, 1915.

HON. WM. HALE THOMPSON, Mayor.

Dear Sir:

In a letter addressed to the corporation counsel dated November 26, 1915, you state that you "have been informed that fences have been built across the extended ends of 53d and 55th streets with the idea of shutting off access to the lake." You request an "opinion upon the right of anyone to build and maintain these fences and the right of the city to take them down."

Under an act of the General Assembly, approved June 11, 1912, the South Park Commissioners, a municipal corporation, was authorized to enter into settlement agreements with the shore owners for the acquisition of their riparian rights and to establish a boundary line between the lands of the shore owners and the lands to be taken, reclaimed and occupied by the park commissioners for park and boulevard purposes.

Section 1 of said act provides "that every board of park commissioners existing under the laws of this state, which now has, or may hereafter have or acquire, control over two or more separate public parks, whether they constitute a part of one park system or not, bordering upon any public waters in this state, shall have power to connect the same by constructing a park, boulevard, driveway or parkway, extending over and upon the submerged land and bed of such public waters, and over and upon any lands adjacent to or adjoining upon or penetrating into such waters, and may extend any such park by constructing a park, boulevard, driveway or parkway over any private property, * * *." Said Section 1 further provides as follows:

"Said board of park commissioners and said riparian or adjacent owners are hereby authorized to agree upon a boundary line dividing such adjacent, adjoining, submerged and penetrating lands, acquired or to be acquired by said board of park commissioners and such adjacent, adjoining, submerged and penetrating lands to be taken, owned and used by said riparian or other owners in lieu of and as compensation for the release of said lands and riparian rights to said board of park commissioners."

It is provided in Section 2 of the act that if the shore owners and the park commissioners shall enter into an agreement for a boundary line between their respective lands and for the acquisition of the riparian rights of the shore owners by the park commissioners, petitions or bills in chancery shall be filed in the Circuit Court praying that the boundary line may be established and confirmed by the decree of the court, and said Section 2 further provides as follows:

"If, upon a hearing, the court shall find that the rights and interests of the public have been duly conserved in and by such agreement, then the court shall confirm said agreement and establish such boundary line; otherwise, the court shall, in its discretion, dismiss such bill or petition. If the dividing line agreed upon shall be so established and confirmed by the decree or

judgment of the said court, it shall thereafter be the permanent dividing and boundary line of said lands, and shall not be affected or changed thereafter, either by accretions or erosions; and the owners of said shore lands are hereby granted by the State of Illinois the title to the adjacent, adjoining, submerged, penetrating and other lands, whether of natural or artificial formation, lying upon the inner or land side of said boundary line when so established, and they shall have the right to fill in, improve, protect, use for all lawful purposes, sell and convey said submerged or other lands up to the line so established, free from any adverse claim in any way arising out of any question as to where the shore line was at any time in the past, or as to the title to any existing accretions, and said board of park commissioners is hereby granted by the State of Illinois the title for park purposes to the adjacent, adjoining, submerged, penetrating, artificially made and other lands lying upon the outer or water side of the said boundary line and opposite and adjoining to the lands granted and confirmed by said decree to said riparian, shore or other owners."

Under authority of said act, the South Park Commissioners entered into settlement agreements with the shore owners between East 53d street and East 56th street, and under decrees entered by the Circuit Court, in pursuance of said agreements, boundary lines were established between the shore owners and the South Park Commissioners whereby said shore owners released their riparian rights to said commissioners, and in lieu thereof, and as compensation for the same, certain lands on the inner or land side of said boundary lines were decreed by the Circuit Court of Cook County to said shore owners, and certain other lands on the outer or water side of said boundary lines were decreed to the South Park Commissioners for park and boulevard purposes.

The block lying between East 53d street and East 54th street is Block 35 of Hyde Park and for a number of years had been owned by the Pullman heirs, but was conveyed about the year 1912 to several grantees, namely: Jordan, Poole, Gillett, Carter and Reenitz. Settlement agreements were entered into between the South Park Commissioners

and these persons, as shore owners, November 1, 1912, and were confirmed by the Circuit Court of Cook County January 4, 1913.

The boundary line in front of this block was fixed on a north and south line 380 feet east of the east line of East End avenue. This line practically coincides with the east line of the protecting breakwater along the south three-quarters of said block.

The shore frontage of the north half of the block between East 54th street and East 55th street was at the time of the settlement owned by Mr. Thomas A. Collins. The boundary line for this frontage as fixed by decree entered in the Circuit Court April 16, 1913, is a line beginning on the north at a point 380 feet east of the east line of East End avenue and running thence southeasterly to a point on the southern boundary of Collins' holding and 300 feet east of the east line of Everett avenue as said avenue was at that time laid out.

The southern half of the block or tract between East 54th street and East 55th street was owned by two persons, Brega and Barrell. The boundary line, as fixed by decree entered in the Circuit Court January 4, 1913, began at the point last mentioned, namely: 300 feet east of the east line of Everett avenue and extended thence easterly 75 feet; thence south on a straight line, which is 375 feet east of the east line of Everett avenue, as the same was then laid out, to the center line of East 55th street extended east.

The north 407 feet of the tract lying between the center line and East 55th street and East 56th street was known as the Shedd tract, and the south 220 feet of this tract was owned by the Lehmann heirs. The boundary line of this tract begins at the point last mentioned, namely, a point in the center line of East 55th street, extended 375 feet east of the east line of Everett avenue, as then laid out, and ran thence east 113 feet, thence south along a line 488 feet east of the east line of Everett avenue, as the same was then laid out, to the north line of East 56th street.

The boundary line as to the Shedd tract was confirmed

by decree of the Circuit Court January 4, 1913, and as to the Lehmann tract June 17, 1913.

Under and by virtue of the aforesaid agreements and decrees, as above set forth, the South Park Commissioners acquired title and jurisdiction for park and boulevard purposes to the lands lying east of this boundary line.

Each of the said decrees sets forth that the South Park Commissioners intends and purposes to extend Grant Park and Jackson Park upon the bed of the public waters of Lake Michigan adjacent to said parks and also intends and proposes to construct a park, boulevard, driveway or parkway over and upon the submerged lands and bed of the public waters of Lake Michigan and over and upon certain lands adjacent to, adjoining upon and penetrating into said waters, for the purposes of connecting said Grant Park and said Jackson Park.

Since the entry of said decrees the owners of the tracts lying east of Everett avenue and from the middle of the block between East 54th street and East 55th street down to East 56th street have widened Everett avenue, which was originally only 66 feet wide, by dedicating an additional 19 feet along the east side of said Everett avenue. This dedication was made September 18, 1913.

On the same date, the owners of the Brega and Barrell tract dedicated the south 33 feet of the same from the east line of Everett avenue, as widened, to the east line of said tract or a distance of 356 feet, and on the said date the owners of the Shedd tract dedicated the north 33 feet of the same from the east line of Everett avenue, as widened, to the east line of said Shedd tract, a distance of 469 feet. It thus appears that the eastern half of this extension of East 55th street is 113 feet longer than the northern half.

After receiving your letter, I requested the superintendent of the map department to have Mr. George Inman of that department, who is familiar with the conditions along the portion of the lake front in question and with the settlement agreements entered into, to go out and make an inspection of the premises and to submit a map or drawing showing the location of the fences complained of. The map sub-

mitted by Mr. Inman is hereto attached marked Exhibit "A."

I also wrote Mr. J. Frank Foster, superintendent of South Park Commissioners, and Mr. Harry W. Sisson, attorney and agent for the owners of the block between 53d and 54th streets, informing them that you desired an opinion on the subject matter set forth in your letter and asking them for plats showing the location of the fences referred to, and also a statement as to why and by whom these fences had been erected. Mr. Foster has furnished a map, which is hereto attached as Exhibit "B." Mr. Sisson has furnished a map, which is hereto attached as Exhibit "C."

On Exhibit "A" supplied by Mr. Inman, the fence in East 55th street is shown to be on the east line of the north half of the East 55th street extension, or 356 feet east of the east line of Everett avenue as widened. It is indicated by red X marks and is stated to be a three board fence. From this exhibit it is shown as extending only to the center of the street, and a ditch is indicated as occupying a portion of the south half of the street at this point.

On Exhibit "B," the map supplied by Mr. Foster, the fence is indicated as extending entirely across East 55th street at a point 375 feet east of the east line of Everett avenue before the same was widened. This would coincide with the point 356 feet east of the east line of said avenue as widened.

If the fence extends entirely across the street, as shown by Mr. Foster, then the south half of the same operates as an obstruction to that portion of the extension of the south half of East 55th street lying east thereof or a strip 33 feet wide and 113 feet long.

Mr. Foster wrote me under date of December 23, 1915. I herewith attach his letter for your information and direct your attention particularly to the portions which read as follows:

"The fence at the east end of 55th street was constructed for the purpose of preventing further dumping anywhere between 54th place and 56th street as the land has now been filled in to a height desired by the Park

Commissioners and any further dumping would have to be placed in the unprotected waters of Lake Michigan which is against the law. Therefore to prevent this a fence was constructed, on the park boundary line as established in the north half of 55th street and was continued to the south side of 55th street by the Park Commissioners. * * *

"If the city desires the South Park Commissioners can put the fence so that it runs south to the center line of 55th street, then east to the boundary line running south from 55th street."

"A fence was also placed across the end of 56th street in extension of the boundary line by the Park Commissioners for the same purpose as the fence erected at 55th street."

"If you desire this fence can also be removed and extend along the north line of 56th street to the lake."

The 56th street fence was not mentioned in your letter. However, as above indicated, Mr. Foster says the same can be removed from its present location and extended along the north line of 56th street to the lake. This then would give the public access to the lake along the line of East 56th street but would prevent access for unauthorized dumping upon the lands of the South Park Commissioners at the point indicated.

As to East 55th street, it will be observed from the foregoing and from Exhibits "A" and "B" hereto attached that said street has never been dedicated to the water's edge, that there is land between the eastern terminus of said street as dedicated and Lake Michigan and that this land belongs to the South Park Commissioners.

So far as I have been able to obtain information, nothing has been done by the City of Chicago indicating its acceptance of East 55th street east of Everett avenue. The action of the owners of the Shedd and the Brega and Barrell tracts taken September 18, 1913, merely operates in law as an offer to dedicate the street until the city has accepted the same. Such acceptance may be indicated in various ways, such as improving the street, laying sewers or water pipes or erecting lights, etc., or by express order or ordinance of acceptance passed by the City Council. It is most likely,

however, that the same will in time be accepted and improved as a street.

I am accordingly of the opinion, as to East 55th street, that, if the city has accepted or will accept the dedication offered by the owners, then it has the right and authority to have the fence in the south half of the street removed if it has been erected entirely across the street as indicated on Exhibit "B" furnished by Mr. Foster, but that the city has not the right or authority to demand that 55th street be kept open east to the water's edge. First: For the reason that the same has never been dedicated to the water's edge; and Second: For the further reason that the land east of the eastern terminus of 55th street, as dedicated, is now owned by and is under the jurisdiction of the South Park Commissioners, which is a separate and distinct municipal corporation.

We now come to the consideration of the fence across the east end of East 53d street. Section E, Article IV, of the agreements entered into between the owners of Block 35 of Hyde Park lying between East 53d street and East 54th street is as follows:

"(e) If within one year from October 1, 1912, the commissioners shall not have adopted a plan for and begun in good faith the construction of a roadway and sidewalk extending north from Jackson Park, and in front of, parallel and adjoining the premises herein described, which shall be built and maintained free of expense of any kind to the owner, then and in that event, said owner shall have the right, which is hereby expressly granted, to construct a roadway and sidewalk not more than sixty-six (66) feet in width east of and adjoining the boundary line hereinabove established, and extending from the south line of East 54th street, extended east to the north line of East 53d street, extended east, and in pursuance thereof and for such purposes only to construct a breakwater and fill in Lake Michigan between the south line of East 54th street extended east and the north line of East 53d street extended east, as far as a line sixty-six (66) feet east of and parallel with the boundary line hereinabove established. The title to the land occupied by said roadway and under the same, shall be in said commissioners,

and if at any time, said commissioners shall elect to assume the maintenance and management of said roadway and sidewalk, and either maintain the same as built or develop the same as part of a parkway, driveway or boulevard extending north from Jackson Park, they shall be entitled to do so without expense or cost to the owner, but without any further consent of the owner than that herein granted. In that event they shall thereafter at their own expense perpetually maintain and care for such parkway, driveway, boulevard, roadway or sidewalk, and they shall always provide said owner with a proper roadway and sidewalk for access to and from his said premises on the shore side thereof."

This section was in all respects confirmed by the decrees entered by the Circuit Court of Cook County January 4, 1913, above referred to.

In pursuance of the above and foregoing provision, Harry W. Sisson, attorney for the owners of said Block 35, applied to the war department of the Federal government and under date of August 12, 1914, received a permit from the secretary of war authorizing the work of building a breakwater and filling in Lake Michigan between the south line of East 54th street extended east and the north line of East 53d street extended east as far as a line 66 feet east of a parallel with the boundary line established by the decrees of the Circuit Court January 4, 1913, confirming the agreement between the South Park Commissioners and the owners of said block. A copy of said permit issued by the secretary of war is hereto attached.

Mr. Sisson applied to the City of Chicago on April 30, 1914, for its permit to make the fill and reclamation authorized by the secretary of war. His application was referred to the law department and an opinion furnished to the commissioner of public works. Said opinion directs the commissioner's attention to the portion of the decree in case No. 317609, Circuit Court, as follows:

"Provided, that any land lying and being within and between the north and south lines of East 53d street, either as now located or as extended east, shall upon the reclamation thereof, whether such reclamation has heretofore been effected or shall be effected hereafter,

be deemed to be added to and become a part of said East 53d street and used for street, boulevard or park purposes only."

Said opinion recommends that any permit which might be granted shall contain the following proviso:

"Provided, that any land lying or being within and between the north and south lines of East 53d street, either as now located or as extended east, shall upon the reclamation thereof, whether such reclamation has heretofore been effected or shall be effected hereafter, be deemed to be added to and become a part of said 53d street and used for street purposes only, unless otherwise consented and agreed to by the City of Chicago."

In pursuance of said opinion, on July 17, 1914, special permit No. 114-E was issued to Mr. Sisson. This permit contained the provision above recommended, and further provided that if any of its conditions were violated or if work under it was not completed on or before one year after its date it should be void.

Thereafter, on May 13, 1915, Mr. Sisson applied for and May 21, 1915, received an extension of the city's permit to August 12, 1917. Said extension provides that all other requirements and conditions of said special permit are to continue in force.

On Exhibits "A" and "B" the fence across East 53d street is shown to be located at or near the line of the original protecting breakwater at that point before the reclamation and fill was begun under the said permits. On Exhibit "A," furnished by Mr. Inman of the city map department, it appears that the fence extends only to the north breakwater extending east from the north line of East 53d street, and Mr. Inman reports to me that access along this breakwater is possible. He states that the fence consists of three smooth wires and does not prevent persons from going on the breakwater work, but shuts out teams. Attention is also directed to the city park lying immediately north of East 53d street extending along Lake Michigan to East 51st street. Persons can have access to the lake along the entire length of this park.

Under date of December 23d, Mr. Sisson writes me in regard to the matters in question. I attach his letter for your information and direct your attention to certain portions as follows:

“The obstruction complained of is a temporary fence crossing 53d street about where the old breakwater was. It was placed there for the purpose of preventing the public from dumping manure, garbage, tin cans, trees and other undesirable filling and from obstructing or piling it above grade and it was necessary to do so in order to complete the work of building the breakwater and filling in between the new breakwater and the old shore line from 53d to 54th streets. * * * The public now have access to just as much of the street as it did before we commenced this improvement and I think on referring to said agreement, decree and permits that you will find that the owners are justified and have the legal right to protect the work until finished, at which time we will remove the said temporary fence now across 53d street.”

It is to be observed from the portion of the decree above quoted that any land lying and being between the north and south lines of East 53d street either as now located or as extended east *shall upon the reclamation thereof* be deemed to be added to and become a part of said street and used for street, boulevard and park purposes only, and that the opinion of the corporation counsel above referred to, and the permit granted by the city to Mr. Sisson contained a like provision without saying, however, anything about boulevard or park purposes.

It would, therefore, seem from the language of the decree, opinion and permit that until the reclamation is completed the reclaimed land east of the original breakwater extending across the end of East 53d street will not become a part of the street.

I am, however, aware that the permit is silent upon the question of erecting a fence, and, if the same is erected upon the land as it existed before this reclamation and filling was begun, I believe the city has the right to tear it down. On the other hand, however, until the reclamation is completed and the reclaimed land actually becomes a part of

the city's street, I am of the opinion that Mr. Sisson has the right to protect the area now being reclaimed from trespassers.

I have made inquiry of Mr. Inman as to whether he has observed anything that constitutes a violation of any of the city ordinances, and he informs me that he has observed nothing of such nature. The original permit contains a clause making it revocable at the discretion of the commissioner of public works, and void if any of its conditions are violated. If, however, it should be found that any city ordinances or any of the conditions of the permit are being violated, I am of the opinion that such violation could constitute sufficient grounds for the revocation of the city permit.

SUMMARY.

(a) *As to East 55th street*, I am of the opinion that the city has not the right or authority to demand that it be kept open to the water's edge, first, for the reason that it has never been dedicated east to the water's edge, and, second, for the further reason that the land east of the eastern terminus of East 55th street as dedicated is now owned by and is under the jurisdiction of the South Park Commissioners.

(b) *As to East 53d street*, if the fence complained of is erected upon the land as it existed before the present reclamation and filling was begun, I am of the opinion the city has the right to remove it. On the other hand, however, until the reclamation is completed and the reclaimed land actually becomes a part of the city street, I am of the opinion that Mr. Sisson has the right to protect the area, now being reclaimed, from trespassers.

Further, if it should be found that any city ordinances or any of the provisions of the city permit are being violated, I am of the opinion that such violation would constitute sufficient grounds for the revocation of the city permit.

Respectfully submitted,

JAMES G. SKINNER,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Mayor's Vote on Appointment in Case of Tie.

December 27, 1915.

HON. WM. HALE THOMPSON, Mayor.

Dear Sir :

In answer to your question of the 17th inst., "can the mayor vote in case of a tie in the council on an appointment," we beg leave to state as follows:

By Section 1 of Article 3 of the Cities and Villages Act, it is provided that the City Council shall consist of the mayor and aldermen.

Section 6 of Article 2 of said act provides that "the mayor shall preside at all meetings of the City Council, but shall not vote except in case of tie, when he shall give the casting vote."

Section 3 of Article 6 provides that "all officers of any city, except where herein otherwise provided, shall be appointed by the mayor (and vacancies in all offices except the mayor and aldermen shall be filled by appointment) by and with the consent and advice of the Council."

From the foregoing it will seem that it is the duty of the mayor to make all city appointments by and with the advice and consent of the City Council where no other method is provided for, and that it is his further duty in case of a tie upon a vote taken on any proposition in the City Council to cast the deciding vote.

The fact that the mayor makes all the appointments by and with the advice and consent of the City Council has raised a doubt as to the propriety of his voting in case of a tie in the City Council, when voting on the proposition, "shall the Council advise and consent to the appointment by the mayor."

The duty of the mayor to cast his vote in this instance is as obligatory as in all other cases, and has as much force and is just as binding, because he is considered to act in a dual capacity in this instance and though it may not be exactly in harmony with his modesty, nevertheless, it is his duty. He must vote in all cases of tie without exception.

The authorities sustaining this position are so numerous that we are constrained to make no attempt at a full and complete citation of cases having a bearing thereon, but will confine ourselves to a number of cases as follows:

Launtz v. People, ex rel., 113 Ill. 137.

Carrollton v. Clark, 21 Ill. App. 75.

Carroll v. Wall, 35 Kansas 36.

State ex rel. v. Pinkerton, 63 Conn. 176.

Hecht v. Coale, 93 Md. 693.

State ex rel. Young v. Yates, 19 Mont. 239.

McQuillan on Municipal Ordinances, Page 162, Sec. 102.

Our conclusion is therefore that the mayor can vote upon an appointment made by him in case there is a tie vote thereon in the City Council, and that under the statute it is his duty so to do.

Very truly yours,

EDWARD J. SMEJKAL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTIELSON,

Corporation Counsel.

Inspection of and Permits for Boilers.

December 28, 1915.

HON. GEORGE E. NYE, Chief Boiler Inspector.

Dear Sir:

We are in receipt of your letter of recent date asking for an opinion as to the construction of Section 2391 of The Chicago Code of 1911. You say in your letter that "recently numerous boilers have been inspected, throughout the city that have never been inspected by this department, but have been installed for a period of years. The owners claim exemption from permit on account of this. * * * If boilers were installed before the passage of this ordinance would it be necessary, and where buildings have been sold since installation can present owners be held for permit?"

Clause 67 of Section 1, Article V of the Cities and Villages Act delegates to municipalities the power "to provide for the construction of steam boilers." Clause 63 of the same section delegates to municipalities the right—

"To prevent the dangerous construction and condition of * * * boilers, and apparatus used in and about any building and manufactory, and to cause the same to be removed or placed in a safe condition when considered dangerous; * * *."

In accordance with the foregoing delegated power, the city passed Section 2391 of the code on the first day of May, 1903, which section is as follows:

"No new plants, nor any reconstruction of any old plants, for producing power and heat, or either of them, shall be erected or maintained in the city, until the plans and specifications of the same have been filed in the office of, and approved by, and a permit for such erection or construction issued by, the chief inspector of steam boilers and steam plants, * * *."

It is needless to say that irrespective of any special delegation of power as contained in Clauses 67 and 63 of Section 108 of Article V, the City of Chicago, under its general police powers, had the right to enact such ordinances as would tend to promote the health, comfort, safety and general welfare of the municipality. There is a long line of decisions in our state which have announced the foregoing doctrine, so that even though the Legislature had not specifically authorized the City of Chicago to inspect and regulate steam boilers, nevertheless under the general police powers delegated to it by the Legislature, the city undoubtedly would have the right to make proper provision for the inspection of steam boilers.

City of Chicago v. Bowman Dairy Co., 234 Ill. 297.

City of Belleville v. Turnpike Co., 234 Ill. 428.

City v. Gunning System, 214 Ill. 628.

People v. City of Chicago, 261 Ill. 21.

Smith on Modern Law Mun. Corp., Secs. 1319, 1320 and 1321.

Sign Works v. Training School, 249 Ill. 436.

Dillon on Municipal Corp., 5th Ed., Sec. 301.

Section 2391 of the Code, above referred to, specifically provides for the filing and approval of plans and specifications before any new plants or any reconstruction of old plants for producing power and heat or either of them shall be erected or maintained. This section has no bearing upon the inspection of boilers. Section 2392 of the code provides for the inspection of steam boilers. Section 2397 specifies the fees to be charged for the issuance of permits and the inspection of boilers.

You will note that Section 2391, by its wording, excludes all boilers installed prior to the enactment of the ordinance. It is clear that the City Council, in passing the section, intended it to apply to the filing of plans and specifications and obtaining a permit for the installation of new, or the reconstruction of old boilers after the passage of that ordinance.

Our Supreme Court has repeatedly held that the power to regulate any occupation or business necessarily implies and gives to the municipality the right to license, and that right is most effectually accomplished by the passage of an ordinance fixing the amount of the license or permit fee, and the city would have no right to exact a license or a permit fee unless some provision therefor is found in the ordinance in question. Section 2391 specifically refers to the issuance of the permit for new plants or reconstruction of any old plants, and therefore excludes the right of the city to exact a fee for a permit, even though it has the power to inspect and regulate boilers that were installed prior to the passage of Section 2391.

City of Chicago v. Collins, 175 Ill. 454.

Kinsley v. City of Chicago, 124 Ill. 359.

Herb Bros. v. City of Alton, 264 Ill. 628.

City of Chicago v. Drogasawacz, 256 Ill. 34.

We are of the opinion that there is ample power in the present ordinances to require the taking out of a permit as provided for in Section 2391, since the passage of that section, and to compel payment therefor. This obligation is in no wise changed where buildings have been sold since the

installation. In that event, the law presumes that all improvements were taken into consideration at the time of transfer of the property and the new owner will, therefore, be held liable.

Respectfully submitted,
DAVID T. ALEXANDER,
Assistant Corporation Counsel.

Approved:
SAMUEL A. ETTELSON,
Corporation Counsel.

**Power of Municipal Tuberculosis Sanitarium to Furnish
Sleeping Equipment for Homes.**

December 30, 1915.

MR. FRANK E. WING,
Business Director, Municipal Tuberculosis Sanitarium.

Dear Sir:

Your communication addressed to the corporation counsel, wherein you wish to be advised if the board of directors can legally appropriate money from the sanitarium fund for the purpose of furnishing special outdoor sleeping equipments in the homes of tuberculosis patients, has been referred to me.

In reply thereto, I beg to say:

Paragraph 691, Chapter 24, of Hurd's Revised Statutes of 1913, Section 7 of Municipal Tuberculosis Sanitarium Act, provides as follows:

“SANITARIUM TO BE FREE—REGULATIONS—CONSENT IN WRITING OF PERSON ENTERING—EXTENSION OF BENEFITS INTO HOMES — PERSONS OUTSIDE OF CITY OR VILLAGE.) Every sanitarium established under this act shall be free for the benefit of the inhabitants of such city or village who may be afflicted with tuberculosis, and they shall be entitled to occupancy, nursing, care, medicines and attendance according to the rules and regulations prescribed by said board. Such sanitarium shall always be subject to such reasonable rules and regulations as said board may adopt in order to render the use of said

sanitarium of the greatest benefit to the greatest number, and said board may exclude from the use of said sanitarium any and all inhabitants and persons who shall wilfully violate such rules or regulations: *Provided, however*, that no person so afflicted shall be compelled to enter such sanitarium or any of its branches, dispensaries or other auxiliary institutions without his consent in writing first having been obtained, or in case of a minor or one under a disability the consent in writing of the parents, guardian or conservator, as the case may be.

“Said board shall, upon request or by consent of the party afflicted, or the legal guardian, conservator or parents thereof, have the power to extend the benefits and privileges of such institution, under proper rules and regulations, into the homes of persons afflicted with tuberculosis and to furnish nurses, instruction, medicines, attendance and all other aid necessary to effect a cure, and to do all things in and about the treatment and care of persons so afflicted which will have a tendency to effect a cure of the person or persons afflicted therewith and to stamp out tuberculosis in such city or village.

“And said board may extend the privileges and use of such sanitarium and treatment to persons residing outside of such city or village in this state so afflicted, upon such terms and conditions as said board may from time to time by its rules and regulations prescribe. (As amended by act approved June 27, 1913; in force July 1, 1913.)”

It would seem from the reading of the above section that it was the intention of the Legislature for the board of directors of the Municipal Tuberculosis Sanitarium, under certain conditions, to extend the benefits and privileges of the institution into the homes of persons afflicted with tuberculosis.

The board of directors of the Chicago Tuberculosis Sanitarium, acting under this section, have created the bureau of special relief, and the work of the bureau chiefly consists in remodeling porches by making alterations, installing canvas curtains, furnishing beds, bedding and other equipment to enable tuberculosis patients under the care of the institution to take special outdoor treatment at home.

I am of the opinion the board of directors, so far as possible, when the necessities require it, can legally appropriate money from the sanitarium fund for the relief of tuberculosis patients in their homes, but no money should be appropriated for alterations and remodeling of porches at the home of tuberculosis patients unless the work is of a temporary nature, easily removed, and not permanently attached to the building.

Yours very truly,

CHARLES E. PEACE,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Registration of Persons Engaged in Constructing and Repairing Buildings.

December 30, 1915.

HON. HIRAM VANDERBILT,

Chairman, Sub-Committee of the Committee on Buildings.

Dear Sir:

You have referred to this department an ordinance providing (a) for the registration by the department of buildings of all persons engaged in constructing and repairing the whole or any part of buildings or the appurtenances thereto in the City of Chicago; (b) for the payment to the City of Chicago of a nominal registration fee; (c) that no permits be issued by the department of buildings except to the person so registered; (d) that the name of any one so registered shall be taken off the register if he shall be found to have violated any of the building or health ordinances of the City of Chicago; and you ask for an opinion as to the validity of the same if passed by the City Council.

I have carefully considered the provisions of the above mentioned ordinance, and for the following reasons it is now my opinion that the ordinance is susceptible to legal objections:

The City of Chicago operates under powers granted by the Cities and Villages Act. Under the authority delegated thereunder by the Legislature the city is authorized "to prescribe the thickness, strength and manner of constructing stone, brick and other buildings and construction of fire escapes therein" (Cities and Villages Act, Cl. 61, Sec. 1, Art. V), "to regulate the police of the city or the village and pass and enforce all necessary police ordinances" (Cl. 66), and the City Council has the authority "to do all acts, and make all regulations which may be necessary or expedient for the promotion of health or suppression of disease" (Cl. 78).

The city has no inherent power to license any occupation, and where there is no express power to license such trade given to the city the authority does not exist. It may, however, regulate such trade through and by its police powers, but cannot license as a means of raising revenue. Municipal corporations exercise only delegated and limited powers. The power of a municipal corporation to pass a particular ordinance must be found in its charter in express terms, or it must be necessary, in order to carry out the powers expressly granted, or be essential and not simply convenient to the declared objects and purposes of the corporation.

City of Marengo v. Roland, 263 Ill. 531.

No delegated power is to be found in the Cities and Villages Act giving to the municipality the power to license or regulate the class contemplated in Section 1 of the proposed ordinance submitted to us. The police power is limited to enactments which have reference to the public health or comfort, or the safety or welfare of society.

Bessette v. People, 193 Ill. 334.

It has been said:

"That when the license is for regulation merely,
* * * the question presented is whether the business or occupation is one rendering special regulation important for any purpose of protection to the public or to guard individuals against frauds and impositions."

Cooley on Taxation, 2nd Ed., p. 600.

Hawthorn v. People, 109 Ill. 302.

We do not believe that there is any more relation between the public health, comfort, safety or welfare, and the collection of one dollar from a person engaged in carpentering, than there would be from a person engaged in any other business or occupation which in no way affects the public health. Therefore, Section 1 is invalid, not because its intent is to register names of those engaged in the trade, but because it demands the paying of a sum for the purpose of such registration which is in the nature of a licensing fee. The municipality has had no such power conferred upon it, and can pass no ordinance which is repugnant to the public policy of the state. It may require, however, the registration of all those who employ or who are actually engaged in the building trade, and may refuse to issue permits until they have so complied. It may even go further and provide that, upon a conviction or fine of one for the violation or the failure to comply with the ordinances of the city relative to the erection, enlargement, alteration, repair or removal of any building, the name of such violator shall be stricken from the list and that reinstatement upon the same shall be refused to him for such a period or length of time as the violation of or noncompliance with the law for which he was convicted or fined shall continue or remain unchanged or be remedied as the law prescribes.

The constitutional right of a citizen to engage in business is subject to the state's police power. The right of a citizen to follow any legitimate business or occupation as a means of livelihood is subject to the paramount power of the state to impose any reasonable regulations the public welfare may require (*Henry B. Douglas, Mayor, et al. v. The People ex rel. J. J. Ruddy*, 225 Ill. 536), such as imposing restraints and prescribing such requirements as may be deemed proper for the protection of the public against the evils resulting from the incapacity and ignorance of the persons so engaged. But an ordinance which attempts to deprive a man of the right to follow his trade—and, in short, such is the intent of Section 2—is in conflict with those provisions of the constitutions of this state and of the United States which provide that no person shall be deprived of

life, liberty or property without due process of law. The right of the citizen to follow any legitimate business, occupation or calling which he may see fit to engage in, and to use such right as a means of livelihood, is fully recognized in the constitution of this state and in the constitution of the United States.

Gillespie v. People, 188 Ill. 176.

Bessette v. People, 193 Ill. 334.

The right of every man to choose his own occupation, profession or employment, though not expressly guaranteed by the constitution, is included in the right to the pursuit of happiness.

Black on Const. Law, 411.

In *Allgeyer v. Louisiana*, 165 U. S. 578, it was said:

“* * * that ‘the right to follow any of the common occupations of this life is an inalienable right.’ It was formulated as such under the phrase ‘pursuit of happiness’ in the Declaration of Independence, which commenced with the fundamental proposition that ‘all men are created equal, that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness.’ This right is a large ingredient in the civil liberty of the citizen.”

It was also said in this case:

“that the liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States.”

It was further there said:

“if it does not abridge the privileges and immunities of a citizen of the United States to prohibit him from pursuing his chosen calling, and giving to others the exclusive right of pursuing it, it certainly does deprive him (to a certain extent) of his liberty; for it takes from him the freedom of adopting and following the pursuit which he prefers; which, as already intimated, is a material part of the liberty of a citizen.”

Butchers' Union Co. v. Crescent City Co., 111 U. S. 746.

Our Supreme Court in laying down its interpretation of the word "liberty," as used in the constitution, says liberty means "not only freedom of the citizen from servitude and restraint, but is deemed to embrace the right of every man to be free in the use of his powers and faculties and to adopt and pursue such a vocation or calling as he may choose, subject only to the restraint necessary to secure the common welfare."

Braceville Coal Co. v. People, 147 Ill. 66.

Frorer v. People, 141 Ill. 171. .

Since the Legislature has no power under the guise of police regulations to arbitrarily invade the personal rights and personal liberty of the individual citizen, surely the City Council has none.

The ordinance is further obnoxious inasmuch as it provides a double penalty for the violation or violations of the same act.

We do not believe it necessary to point out further repugnant features, and respectfully recommend that the ordinance be redrafted as we have suggested, or that an attempt be made to have the Legislature pass such a law as would provide uniform legislation for the state to govern the trade which you seek to license and regulate.

Very truly yours,

H. L. BRIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Ordinance Naming City Depositories.

January 3, 1916.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

At the meeting of the City Council held December 30, 1915, the ordinance submitted to the City Council by you accepting the bids for payment of interest made by the va-

rious banks and designating them as depositaries, was changed so that that part of Section 1 which precedes the naming of the depositaries now reads as follows:

“Section 1. That the city comptroller be and he is hereby authorized to accept the bids of the following named banks to act as depositaries for city funds subject to the conditions, limitations and terms set forth in the advertisement for bids for payment of interest on city deposits and subject to the right of the City Council to readvertise for new bids under an ordinance heretofore adopted by the City Council of the City of Chicago and now in full force and effect.”

You will observe that the feature of the alteration made is that the banks in question are not designated as depositaries for the year 1916, but only for an indeterminate period not mentioned, and their designation is subject to such right as the City Council may have to readvertise for new bids and the naming of other depositaries in their place.

The first question that arises is whether the City Council has acted within its authority in designating these depositaries in this way and for such indeterminate and perhaps limited period.

Section 5 of Part Two of Article XII of the Cities and Villages Act which controls the action of the City Council in naming depositaries provides in part as follows:

“§5. It shall be the duty of the comptroller at least once in each year and not later than the first day of December of each year, to advertise for bids from all regularly established national and state banks doing business within the city, for interest upon the money of the city so to be deposited in such banks. Such bids shall be reported to the City Council for its information and consideration not later than the fifteenth day of December of each year, to the end that an award or awards may be made upon such bids by the City Council prior to the end of each fiscal year. Such awards shall be made to the highest and best responsible bidder or bidders. The City Council shall have the power to reject all bids and to designate as many depositaries as it deems necessary for the protection of the city's interests, and award bids accordingly.”

Under the provisions quoted above, it is plain that the city comptroller may advertise as often as he deems proper each year, but such advertisement or advertisements are to be made before the first day of December and reported to the City Council not later than the fifteenth day of December in order that the award or awards may be made strictly in accordance with the statute.

It also seems clear that the statute contemplates that such awards shall be for the succeeding fiscal year, although we do not believe that the ordinance as passed is in conflict with the statute in this respect because there is no express provision stating that such awards must be for a whole year.

From information at hand, we learn that you complied with the statute and advertised for bids before December 1st; that these bids were submitted to the City Council and rejected. We also learn that on December 7, 1915, you advertised a second time. This second advertisement we regard as not a compliance with the statute but a compliance with the orders of the City Council which exercised its right to reject the bids regularly called for and its right to designate depositaries in another way.

We construe the sentence which gives the City Council the power to reject all bids and to designate as many depositaries as it deems necessary for the protection of the city's interests, and to award bids accordingly, as a provision which authorizes the City Council to depart from the precise method pointed out by the statute if it regards such a course necessary to protect the city's interests. To illustrate: If the bids received by the comptroller in response to an advertisement in strict conformity with the statute had been from the weaker institutions only the City Council in its discretion would have the right to reject all of those bids and to award the funds to stronger institutions that had submitted no bids at all, provided it deemed such a course necessary for the protection of the city's interests. Hence, we find nothing contrary to law in the procedure of the City Council in naming the depositaries in the manner it did and for the indeterminate time that they were named. It is merely a departure from the

custom heretofore established, but it is not in conflict with the statute and the depositaries so named are, for the time being, officially the depositaries of city funds.

Another question arises, however, as a result of this change of the proposed ordinance, that is, whether the bonds that have been submitted by the institutions so designated as depositaries are in force, and whether they could be regarded as valid instruments binding the sureties in case there should be a loss. On this point we feel that there is sufficient doubt to justify us in advising you to secure new bonds. We also believe that it would be proper under the circumstances to secure an expression of acceptance from each of the depositaries so named, duly signed by the proper officers, to the effect that the bid for interest will stand under the changed conditions.

The rule with regard to the liability of a surety is well established that a material alteration or change in the condition without the surety's consent discharges the surety.

"A surety is discharged by a material alteration or change, without his consent, in the contract entered into by him or in the contract the performance of which is secured; * * * It is immaterial that the alteration was made without fraudulent intent, or that it is not prejudicial, or even that it is for the surety's benefit."

32 Cyc. 177.

It may be said that it is doubtful whether the change is of such a material nature that it would discharge the surety in such a case as this, but we believe that the city's interests might be jeopardized under the circumstances since the question of materiality would be one that would have to be determined by a court or jury if there should be a failure of one of the depositaries.

Our reasons for coming to this conclusion are as follows: The advertisement in the first instance called for bids for interest on city deposits "for the fiscal year 1916." The bid in every case was submitted on a blank which contained a copy of the advertisement and it states that the bidder submits a bid in response to the request for bids as advertised by the city comptroller. It further states that the

bidder will pay interest at the rate bid on average daily balances on deposit with it "during the year 1916."

The bond submitted by each of the depositaries contains a recital to the effect that the principal "has been designated by the City Council of the City of Chicago as a depositary of the funds and moneys of said city for the year 1916." The obligation of the bond is to the effect that the principal shall well and faithfully perform and discharge its duties, etc., "in accordance with the laws of the State of Illinois and the ordinances of the City of Chicago *and the bid of said principal.*"

Taken altogether, the advertisement, bid and bond are all based on the theory that the depositary is to be named for the year 1916. To name the depositary for an indeterminate period, presumably less than for the entire year, constitutes a change in the condition of the undertaking which the bond is intended to secure. Whether such change would be held material or not is doubtful, and since such doubt exists the city's interests would not be properly conserved unless this doubt was removed.

We, therefore, recommend that you notify each one of the depositaries so named that the City Council has exercised its right to reject all bids and to name depositaries which it deems necessary for the protection of the city's interests and to ask them to forward to you an acceptance properly executed by the officers of such depositary, stating that the terms of such designation as set forth in the ordinance passed are accepted and that the interest will be paid in accordance with the bid heretofore presented, and further asking them to file with you a new bond based on the conditions as they now exist.

We will prepare forms for these new bonds and submit them to you.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTIELSON,

Corporation Counsel.

Arrest of Drivers of Mail Wagons.

January 4, 1916.

HON. C. C. HEALEY, General Superintendent of Police.

Dear Sir:

Your communication addressed to the corporation counsel, wherein you wish to be advised if it is a violation of any Federal statute for police officers to arrest and detain drivers or operators of mail wagons or automobiles while engaged in the collection or delivery of the mail, has been referred to me. You also wish to be advised if it is a violation of any Federal law to delay the driver or operator of mail wagons or automobiles while engaged in the collection or delivery of mail, in order to ascertain the name and address of the person so that he may be summoned into court.

In reply thereto, I beg to say that the first question submitted by you for consideration is general, and to give you the information requested it will be necessary to refer you to the law which applies generally to the subject matter of your inquiry. Section 3995 of the U. S. Revised Statutes reads as follows:

“Any person who shall knowingly and wilfully obstruct or retard the passage of the mail, or any carriage, horse, driver, or carrier carrying the same, shall, for every such offense be punishable by a fine of not more than one hundred dollars.”

This section was passed upon in an opinion by Assistant Attorney General Thomas of October 2, 1894, Vol. 3, page 105, for the Post Office Department, as follows:

“* * * The obstructing of the mails must be knowingly and wilfully done. It must be the purpose and intention of the party to obstruct the mails. Where the act, which obstructs the mail, is in itself *unlawful* the party is conclusively presumed to have intended the result of his unlawful act and is guilty of violating this section. When the act is in itself *lawful*, then no such presumption arises and this section does not apply to such a case. See opinion by Justice Field in *United States v. Kirby* (7 Wallace 482).

"It is necessary, therefore, to decide what acts are lawful and what unlawful, to settle each case as it arises.

"It is uniformly held that parties in the public service of the Government are exempt, as a matter of public policy, from arrest upon civil process while thus engaged. (*United States v. Kirby*, 7 Wallace 482; 8 Law Reporter 77.) Hence the serving of a civil warrant on a carrier engaged in his duty is unlawful, and if it obstructs the mails the offender is guilty of a violation of this section. (*United States v. Harvey*, 8 Law Reporter 77.) Also one having a lien on a horse for his keep can not enforce it while the horse is drawing a wagon carrying the mails. (*United States v. Barney*, 3 Hughes, Cir. Ct. Reports, 545.)

"Where a party obtained judgment and an execution from state court against a railway company under which he stopped the train on that company's road carrying the mails, it was held to be a violation of this section. (*United States v. DeMott*, 3 Fed. Rep. 478.)

"On the other hand it is held that no public officer is placed by his position above responsibility to the legal tribunals of the country when accused of a felony. Hence the execution of a warrant on a carrier engaged in his duty, who is charged with a felony, is lawful, and though it obstructs the passage of the mails, it is not a violation of this section. (*United States v. Kirby*, *supra*.)

"The arrest of a driver, who is driving a mail wagon through the crowded streets of a city in such manner as to endanger the safety of the passers by, is lawful, and does not violate this section. (*United States v. Hart*, 1 Peters Cir. Ct. Reps. 390.)

"Where the mail wagon was on runners, in consequence of the street being covered with snow, and no bells had been put on the horses as required by city ordinance, the arrest of the driver was held not to be a violation of this section. (*United States v. Hart*, *supra*.)

"In *Penny v. Walker* (64 Mo. 430), it was held that a mail carrier, though he can not be detained while on duty under any civil process, is liable to arrest upon a charge of any criminal offense. (Cited 16-Am. Rep. 269.)

"It has been held that trains carrying the mails may be prohibited from running through a city at a higher speed than six miles an hour. (Am. and Eng.

Encyc. Law, 1st Ed., Vol. 18, p. 856, and note citing an opinion by Attorney General, 5 Ops. Atty. Gen. 554.)

“The rules and regulations for the safety and comfort of the inhabitants of cities are necessarily lodged very largely in the police powers and must control the contractors and drivers of mail wagons in such cities. It is not to be presumed these powers will be abused and unnecessary restrictions placed by the police on the use of the streets.”

The case of *United States v. Bean*, 24 Fed. Cases, No. 14550, was a proceeding before Commissioner Hamlin against Gustavus L. Bean for delaying the mail by arresting for debt one John G. Withee, a mail carrier, who had come to the postoffice for the mail. The court held that a driver and carrier of United States mail is exempt from arrest on civil process while engaged in the service, and this exemption extends to such driver or carrier while he is waiting for the mail.

The case of *United States v. Kirby*, 7 Wallace, 482, was a case against the defendant for delaying the mail by arresting one Farris, a carrier of the mail, upon bench warrants from the Circuit Court of Gallatin County, Kentucky. The court said at page 486:

“* * * No officer or employe of the United States is placed by his position, or the services he is called to perform, above responsibility to the legal tribunals of the country, and to the ordinary processes for his arrest and detention, when accused of felony, in the forms prescribed by the constitution and laws. The public inconvenience which may occasionally follow from the temporary delay in the transmission of the mail caused by the arrest of its carriers upon such charges, is far less than that which would arise from extending to them the immunity for which the counsel of the government contends. Indeed, it may be doubted whether it is competent for Congress to exempt the employes of the United States from arrest on criminal process from the state courts, when the crimes charged against them are not merely *mala prohibita*, but are *mala in se*. But whether legislation of that character be constitutional or not, no intention to extend such exemption should be attributed to Congress unless clearly manifested by its language. All laws should receive

a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression; or an absurd consequence. It will always, therefore, be presumed that the Legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter."

The city marshal of Malden, Missouri, arrested the locomotive engineer of a mail train for violation of the city ordinance prohibiting the running of trains through the city at a greater speed than five miles an hour. The question was presented to Assistant Attorney General Thomas for an opinion if the said marshal was guilty of a violation of Section 3995 of the U. S. Revised Statutes, and passing on the facts of the case, in the opinion for the Post Office Department, Vol. 3, page 120, he said as follows:

"* * * The weight of authority is to the effect that a person can not be arrested so as to delay the mails on civil, but may be on criminal process, even though the offense be a mere misdemeanor, (*United States v. McCracken*, 3 Hughes, Cir. Ct. 544; *United States v. Harvey*, 8 Law Rep. 77; *Penny v. Walker*, 64 Me. 430; *United States v. Barney*, 3 Hughes, Cir. Ct. 545; *United States v. Hart*, 1 Pet., Cir. Ct. 390; *United States v. Kirby*, 7 Wall. (U. S.) 482; 5 Ops. Atty. Gen. 554.)

"The general rule to be deduced from these cases is that those in charge of the mails may be arrested for the enforcement of a *public* but not a *private* right. Here is where the line must be drawn. Where the enforcement of two public rights at the same time becomes impossible or at least impracticable, one must, of necessity, yield to the other. The people have the right to use the mails in their intercourse with each other and they also enjoy the right of security for their persons and property. It is universally deemed wise to prohibit fast driving of horse teams or the fast running of railroad trains in the limits of towns and cities, and to make such prohibitions effective by punishment by fine or imprisonment or both. These two public rights came in conflict with each other in the city of Malden on the 4th day of August, 1894. Which should have yielded? The mail was delayed thirty minutes and that is a comparatively small evil compared to the defiance of law and the ordinances of cities enacted for the safety of the

people involved in holding the city marshal guilty of a crime in making the arrest. It is true that the rights of the people of Malden alone were involved in *this case*, but the principle applies to every town and city in the United States, and hence it may very well be said that the whole people are interested."

From an examination of authorities upon the subject of arresting persons having the custody of the mail, I am of the opinion that Assistant Attorney General Thomas has correctly stated the law in the above opinion to the post office department.

In reply to your second question I wish to state that the mere detaining of drivers or operators of mail wagons or automobiles while they are engaged in the collection or delivery of the mail to ascertain their name and address, so that they may be summoned into court, is not a violation of the Federal statute. The delay, however, should not be unreasonable, for the law does not allow any justification of the wilful and voluntary act of obstruction to the passage of the mail.

Very truly yours,
CHARLES E. PEACE,
Assistant Corporation Counsel.

Approved:
SAMUEL A. ETTelson,
Corporation Counsel.

Outline of the City's Government.

January 4, 1916.

HON. WILLIAM A. PRENDERGAST,
Comptroller of the City of New York.

Dear Sir:

In your letter of recent date addressed to the mayor of Chicago, which was turned over to the corporation counsel for reply, you ask for information in regard to some matters which the undersigned was directed to furnish.

The questions you ask relate principally to the control which the Legislature has reserved over the city's affairs,

and, in order that you may fully understand same, it is necessary to make some preliminary explanation:

The local government is of rather a complex nature and is entrusted to several municipal corporations and quasi municipal corporations, besides the county government which is an arm of the state. The general corporate affairs of the city are in the hands of the city government. The parks are under the jurisdiction of various park bodies named independently of the city administration. The sanitary canal and drainage affairs generally are in the hands of the Sanitary District. Election matters are under the control of a board of election commissioners named by the county judge. School affairs are in the hands of a board of education named by the mayor and approved by the City Council. The same is true of the public library and the municipal tuberculosis sanitarium. The Municipal Courts are made up of judges, a clerk and a bailiff elected by the people. The county government has control of the Circuit, Superior, County and Probate judges, recorder, state's attorney and other officers who are under the financial management of a board of county commissioners. All matters relating to the county government are controlled by statute,—there being no law-making body connected therewith.

The first point on which you ask for information is as follows:

“(1) The number and classes of subordinate officials and employes of the other city departments and officers, and the rates of compensation paid to such employes, in such instances as they may be fixed by the Legislature.”

The statutes provide for the election of the mayor, treasurer, clerk, 70 aldermen, judges of the Municipal Court, clerk of the Municipal Court and bailiff of the Municipal Court. The statutes also provide for a comptroller, corporation counsel, commissioner of public works, superintendent of streets, board of local improvements, superintendent of special assessments, superintendent of sewers, city engineer and secretary of the board of local improvements. They also provide for a civil service commission, a board

of election commissioners, an oil inspector, park boards, drainage trustees, library board, board of education and board of directors of the Municipal Tuberculosis Sanitarium. There is some provision made for minor boards, such as pension boards, art commissions, etc., which we assume you are not particularly interested in. The statute also authorizes the City Council by ordinance to provide for a collector, a marshal and other officers, if it sees fit to name them, and specifies the duties of the collector. The position of marshal has not been created by ordinance, but officers have been created by ordinance, the head of each department being an officer under this law. The statutes place into the hands of the City Council the right to fix the compensation of all officers and employes, such compensation to be by salary and to be fixed in the annual appropriation ordinance. Notwithstanding this provision of the statute, the salaries of the civil service commissioners and the election commissioners are fixed by statute. The statute also prescribes a minimum salary for the judges, the clerk and the bailiff of the Municipal Court, but these can be raised by the City Council, and they provide a maximum salary for the oil inspector. Aside from these officers, the compensation of city employes is not fixed by statute. The statutes, however, fixes the compensation of almost all of the county officers and the sanitary district trustees. The members of the park board, school board, library board, board of directors of the Municipal Tuberculosis Sanitarium and minor boards act without compensation. That is the extent of the legislative control of the salaries of local officials.

The next point on which you ask for information is as follows:

“(2) The extent to which the proceeds of municipal taxes, license fees and other forms of revenue are specifically appropriated to specified uses.”

Separate provision is made for tax levies for schools, library, tuberculosis sanitarium, parks, pension boards, sanitary district and county. The taxes so received must be devoted to those particular purposes. The laws also re-

quire all water rates to be kept in a separate fund and authorize the collection of a vehicle tax which must be devoted to the care and maintenance of streets. In the case of the schools and the circuit and superior judges, the state makes some contribution which of course must be devoted to those purposes for which it is made. Aside from the above, the revenues of the city can be used in such manner as the City Council sees fit to use it. In the case of the schools, the tax levies for educational purposes and for building purposes are separate and the proceeds of same must be devoted to the specific purposes for which they are levied. There is, of course, a separate levy for the county. This is under the control of the county board, except in so far as the statutes require fixed payments to be made for specific purposes, such as the payment of widows' pensions, the payment of its proportion of the election commissioners' expenses, etc.

The last point on which you call for information is the following:

“(3) The extent the municipal authorities of your city are empowered to effect reorganization of the city and county departments, involving consolidation or abolition of departments, bureaus or offices.”

There is little latitude allowed the local authorities to effect reorganization and consolidation. The city, county and sanitary district cannot be consolidated without a change in the constitution. As to the other branches of the local government, efforts have been made from time to time to bring them all under one head, but so far the only tangible effect of the work along this line has been the passage of the park consolidation act which will be voted on in the near future by the people. Under this act, if adopted by the people, the parks will be brought under the control of the city and the library will also be made a branch of the city government, although the act provides for controlling bodies which will have the handling of the funds and the general management of same. Aside from this, there is little hope offered the municipal authori-

ties to effect the consolidation of offices or the abolition of departments.

The above outlines in a general way the system under which the local government is controlled. If you desire further information, please inform us to that effect.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

License Fees of Private Detective Agencies.

January 6, 1916.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

We are in receipt of your letters concerning license fees paid by the Pinkerton National Detective Agency, P. J. Harding Detective Agency, Inter-State Detective Agency and O'Brien Secret Service Agency. All these letters relate to the return of money paid for license fees under the ordinance requiring such fees from private detectives and from persons furnishing private detectives for hire. The Supreme Court, in the recent case of *City of Chicago v. O'Brien*, 268 Ill. 228, decided that the city had no right to exact such license fees, and the above named agencies have made demand for the return of the money paid to the city by them for their licenses before the ordinance was declared invalid.

The law is well settled that moneys voluntarily paid to a municipal corporation for licenses cannot be recovered even though the city had no right to impose the tax.

“§1621. VOLUNTARY PAYMENTS—MISTAKE OF LAW.)
Money voluntarily paid to a corporation under a claim of right, without fraud or imposition, for an illegal tax, license, or fine, cannot without statutory aid—

there being no coercion, no ignorance or mistake of facts, but only ignorance or pure mistake of the law—be recovered back from the corporation, either at law or in equity, even though such tax, license fee, or fine could not have been legally demanded and enforced.”

Dillon on Mun. Corp., Fifth Ed., Sec. 1621.

The rule above stated is supported by a long line of decisions, and there is no conflict of authority on the proposition, many of the cases holding that even where the money is paid under written protest it is a voluntary payment under the law.

This subject has been passed on by the Law Department a number of times, as questions have arisen involving this doctrine. The same rule applies as in the case of the vehicle tax that was held invalid, concerning which you were advised a short time ago. We therefore deem it unnecessary to discuss at length the general proposition as stated above, and will only direct your attention to the law on the question of duress in such cases.

The general rule on this point is well stated by Cooley, as follows:

“All payments are supposed to be voluntary until the contrary is made to appear. Nor is the mere fact that a tax is paid unwillingly, or with complaint, of any legal importance, but there must be in the case some degree of compulsion, to which the tax-payer submits at the time but with notification of some sort equivalent to reservation of rights.”

Cooley on Taxation (2nd Ed.) 810.

The question of duress is susceptible of very fine distinctions. Thus, in the case of *Conkling v. City of Springfield*, 132 Ill. 420, the court recognized the principle that where a person is called on, peremptorily, to pay, under a warrant, and can save himself and his property in no other way than by paying the illegal demand, he may give notice that he pays it under duress and not voluntarily, and, by showing that he is not liable, recover it back; yet, the court held in that case that, as neither the town nor the county collector had the power to collect taxes on real estate by distraint and sale of personalty, the payment of such tax

as a result of a threat to levy on the property, is not a payment under duress, though made under protest.

It is therefore clear that merely making a protest is not sufficient to bring the payment into the class of payments for which a recovery can be had in case the tax or license has been illegally demanded. There must be something more than a protest. There must be compulsion of a kind that is effective.

The Conkling case above mentioned is not an isolated instance of the courts of this state holding that what appears to be duress is not in fact duress owing to a mistaken view of the law. We cite the following cases on the same point:

Water Falls v. City of Cairo, 58 Ill. 403.

Walser v. Bd. of Education, 160 Ill. 272.

Otis v. People ex rel. Raymond, 196 Ill. 542.

People ex rel. Cougill v. I. C. R. R. Co., 265 Ill. 429.

Schoden v. Schaefer, 184 Ill. App. 456-471.

It will thus be seen that in all instances where the license fee was paid voluntarily and without protest there is no basis in law whatever for a demand for the return of the fee. Furthermore, even where protest was made at the time of payment, there can be no recovery unless the circumstances were of a character that there was duress; and such duress must have been real, not fancied.

In the case of the Harding Agency it is claimed that the license fee was paid after suit was brought for the penalty provided by ordinance, and that the money was turned over only after the matter came up in court, when it was agreed that the case would be dismissed if payment was made. If these facts can be substantiated we are of the opinion that a clear case of duress exists as to this payment, but not as to any made by the same party before or after this incident. We therefore suggest that as to this case the party be told he should submit a claim and proof to the Committee on Finance. As to all the rest, we beg to advise you that it is our opinion that the payments cannot be recovered.

Our conclusions may be summed up as follows:

1. No license fee paid under a void ordinance can be recovered back if such payment was not made under mistake of fact or coercion.

2. The claims made by the various parties for the recovery of license fees paid by them under the ordinance requiring licenses from private detectives cannot be maintained in law, with the exception of one claim made by the P. J. Harding Detective Agency, on which we recommend that they be told to file a claim and submit proof.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTelson,
Corporation Counsel.

Legal Status of Property on Monroe Street.

January 6, 1916.

HON. WILLIAM R. MOORHOUSE, Commissioner of Public Works.

Dear Sir:

We beg to submit herewith an opinion as to the legal status of the property of Lucius G. Fisher and John V. Farwell Company, located on both sides of Monroe street, abutting the Chicago river, in Blocks 79 and 80, in School Section Addition to Chicago, on the following propositions:

1. Was the dedication of Monroe street adjoining this property statutory, or merely a common law dedication?

2. Have the owners of this property riparian rights that run to the center of the bed of the Chicago river?

3. In this case must compensation for damages be paid in advance?

The original plat of School Section Addition to Chicago embraces the territory bounded by Madison, 12th, State and Halsted streets.

The City of Chicago now owns Lots 1 and 2, in Block 80, and from the abstract in possession of the comptroller, there appears on the first page, as Note 1, the following:

“Plat of School Section) Recorded in Book A, page
Addition to Chicago.) 315.

Said plat does not show date of record and is not certified to, nor acknowledged.

“Recorded on page 317 is an order adopted by the Common Council of Chicago, July 31, 1845, and directed to the Recorder of Cook County, to enter the certificate upon aforesaid map in accordance with an act to that effect, by the General Assembly of the State of Illinois, approved March 3, 1843.

“For ‘An Act to legalize the recorded plat of School Section Addition to Chicago,’ (recorded in Book A, page 315) ‘and for other purposes.’ Approved March 3, 1843. See Session Laws of 1842, 3, page 63, and Section 1 of said Act.”

In the case of *Sears v. City of Chicago*, 247 Ill. 204, 218, the question of the rights of the city in Van Buren street, Dearborn street and Plymouth place were under consideration, and the court in its opinion indicated that counsel for the city admitted “that the plat did not comply with the law of 1833, providing for the recording of plats,” which was in force at the time the plat was recorded. The court said further:

“This plat was before this court in the case of *Sanitary District v. Pittsburgh, Ft. Wayne and Chicago Railway Co.*, 216 Ill. 575, and it was there held that the plat of School Section Addition not having been executed according to the statute then in force, amounted merely to a common law dedication, and that the abutting lot owners took the fee to the center of the streets marked thereon. The city contends that the curative act of 1843 removes all legal objections to this plat and gives it the same effect it would have had if the law of 1833 had been complied with in the first instance.”

The curative act set out on page 218, and referred to in the abstract, was commented on by the court, as follows (p. 219):

“This act is relied on by the city, and it is strenuously contended that it had the effect of vesting the fee

in the streets in the city. To this we cannot assent. The title of the abutting lot owners who purchased lots in the School Section Addition prior to the passage of the Act of 1843 had become vested to the center of the streets, and to give the Act of 1843 the effect contended for would be to deprive such abutting owners of their property without due process of law and would be a taking of private property for public use without compensation. The title of the abutting owner to the center of the street where the city does not own the fee is not a contingent interest or a mere expectancy but is a present subsisting ownership of the fee, subject to the easement of the public, which he may subject to any private use he sees fit, in connection with his premises, which is consistent with the dominant rights of the public in the easement. Any statute which, acting retroactively, would deprive one of property rights thus vested would be unconstitutional and void."

The courts have uniformly held this plat to be a common law plat, because of noncompliance with the statute of 1833.

Farwell v. Chicago, 247 Ill. 235.

Illinois Trust and Savings Bank v. Chicago, (*ante*, p. 264).

Sears v. Chicago, (*ante*, p. 212).

Sanitary District v. Pitts., Ft. W. & Chicago Ry. Co., 216 Ill. 576.

As to the proposition of whether the dedication is statutory or at common law, I am of the opinion, in view of the decisions on this point and from the evidence obtained in the abstract herein referred to, that it is without doubt a common law dedication, giving the city merely an easement in the street and leaving the fee in the abutting property owners.

AS TO PROPOSITION No. 2.

The authorities are consistent in holding that owners of property abutting upon a river have riparian rights to the center of the current, subject only to the right of the public to the free and undisturbed navigation of the river.

Chicago v. McGibb, 51 Ill. 266, 272.

Albany Bridge Co. v. People, 197 Ill. 199, 205-6.

Ballance v. City of Peoria, 180 Ill. 29, 41-2.

The Chicago & Pacific R. R. Co. v. Stein, et al., 75 Ill. 41, 45-6-7.

In the case of *Albany Bridge Company v. The People*, *supra*, on pages 205-6 the court said:

“Further, in *Washington Ice Co. v. Shortall*, 101 Ill. 46, we said (p. 52): ‘Chancellor Kent, in his commentaries, declares it as settled that grants of land bounded on rivers, or upon their margins, above tide water, carry the exclusive right and title of the grantee to the center of the stream, subject to the easement of navigation, unless the terms of the grant clearly denote the intention to stop at the edge or margin of the river. If the same person be the owner on both sides of the river, he owns the whole river to the extent of the length of his lands upon it. (3 Com. 427, 428, marg.) And this title to the middle of the stream includes the water, the bed and all islands. (2 Hilliard on Real Prop. 92; Angell on Watercourses, Sec. 5.) This rule of the common law has been adopted in this state and is here the settled doctrine. It was so held in *Middleton v. Pritchard*, 3 Scam. 510, and *Houck v. Yates*, 82 *id.* 179, with regard to the Mississippi river where it bounds this state; in *Braxton v. Bressler*, 64 Ill. 488, as to Rock River; *City of Chicago v. Laflin*, 49 Ill. 172, and *City of Chicago v. McGinn*, 51 *id.* 266, in regard to the Chicago river.’ See also *Trustees of Schools v. Schroll*, 120 Ill. 509.”

In the case of *Ballance v. City of Peoria*, *supra*, on pages 41-2, the court said:

“What is said in regard to the Chicago river applies to the Illinois river, as both lie wholly within the state. If the city has the right to control and use the river and the soil covered by it for the width of the street, as a riparian owner, subject to the easement in the public for the purposes of navigation, a lot owner bordering on the river has the same right, and if clothed with that property right, his property, although it may be submerged lands, cannot be taken without just compensation. In *Chicago and Pacific Railroad Co. v. Stein*, 75 Ill. 41, where the property of a riparian owner on the north branch of the Chicago river was damaged by the erection of a pier in the river in the construction of a railroad bridge over the river, under a charter granted by

the State, we held that an action for damages would lie. After citing authorities it is there said (p. 45): 'From these authorities it is clear that appellees were the owners of the lots fronting upon the river to the center of the current, subject only to the right of the public to the free and undisturbed navigation of the river. The State could not take or damage appellees' property fronting upon or in the bed of the river without first making compensation therefor, nor could it by granting a charter to appellant authorize appellant to do what it could not, in its sovereign capacity, do itself.' "

In the case of *The Chi. & Pac. R. R. Co. v. Stein, et al.*, *supra*, on pages 45 and 47, the court said:

"If, therefore, appellees' property was taken or damaged by the erection of the bridge, a right of action exists in their favor.

"The damages for which they may, however, recover, must be special to their own property, and not such as are incidents to, and shared by, the public at large.

"The construction of any great thoroughfare may discommode those who may reside in the vicinity of the route where the improvement is made, and to some extent damage or lessen in value property, yet if damages could be recovered for inconveniences which are shared by all alike, it would retard the improvement and development of the country to such an extent that it would be difficult to construct a railroad or build a canal.

"The claim made by appellees in this case is, that by the erection of the bridge and the bridge protection in the river, boats and vessels could not pass and repass in the river, and land at appellees' dock with that facility that they otherwise could, were it not for the erection of the bridge.

* * * * *

"If the erection of the bridge was an injury or damage to the premises, permanent in its character, and not such as was shared by the public at large, then it was proper for the appellees to establish the fact that the value of the premises had decreased by the erection of the bridge.

"We see no reason why it would not have been proper for appellees to have proved the value of their property before the erection of the bridge, and the value after the building of the bridge."

“In other words, it would have been proper to have shown how much less the property would sell for in consequence of the erection of the bridge than if it had not been built. *Ottawa Gas Light Co. v. Graham*, 28 Ill.; *Ill. Cent. R. R. Co. v. Grabill*, 50 *ib.* 242.”

As to this proposition, I am of the opinion that the owners of property abutting the river have riparian rights running to the center of the bed thereof, and that such property cannot be taken or damaged in connection with building the bridge in question without first making compensation therefor.

As to proposition No. 3, must compensation be paid in advance?

In order to answer this question, it is necessary first to determine:

(a) Whether the city is about to cause a physical injury to the property, within the meaning of the Constitution of 1870.

(b) Whether the fee to the street is in the city or abutting property owner.

Mr. T. G. Pihlfeldt, City Bridge Engineer, says that in order to build an abutment to the bridge and raise the grade of Monroe street, there will have to be removed for a distance of approximately sixty feet, the foundation under the Fisher Building, extending about four feet three inches into Monroe street; also to remove for a distance of approximately twenty feet, the foundation extending out four feet three inches along the dock, and the dock itself on the river. By a necessary change of grade, egress and ingress to both of said buildings will be obstructed.

Without going into details, the facts and conditions as to the Farwell property are about the same on Monroe street and along the dock.

Such acts as indicated in Mr. Pihlfeldt's statement have been held to come within the Constitution of 1870, and amount to a physical taking of property.

Chicago v. Taylor, 125 U. S. 161.

Davenport Bridge Ry. Co. v. Johnson, 188 Ill. 472.

Chicago v. Jackson, 196 Ill. 496.

Chapman v. City of Staunton, 246 Ill. 394.

Bond v. Penn. R. R. Co., 171 Ill. 508.

In the case of *Chapman v. City of Staunton*, *supra*, pages 397-8, the court said:

“Appellant’s contention that the damages recoverable by appellee must be limited to such damages as accrued to the lot, independent of the building thereon, cannot be sustained. The owner of a lot has the right to improve the same by erecting buildings thereon, and such buildings, when erected, are as much within the constitutional guaranty against damage for public purposes as the ground upon which they stand. The provision includes damage to private property, which includes the land and whatever is attached to it. If the land and the buildings on it, or either, are damaged the constitution requires compensation to the owner. (*Reardon v. City of San Francisco*, 66 Cal. 492; 56 Am. Rep. 109.) To give this constitutional provision the construction contended for by appellant would be, in effect, to deprive the property owner of all substantial benefits from it.”

In the case of *Chicago v. Jackson*, *supra*, at pages 505-6, the court said:

“* * * It has been uniformly held by this court that any change in the grade of a street by which egress and ingress is obstructed to the private property of an owner is damaging private property for public use, within the meaning of Section 13 of Article 2 of the Constitution of 1870. (*Rigney v. City of Chicago*, 102 Ill. 64; *Chicago and Western Indiana Railroad Co. v. Ayres*, 106 *id.* 511; *City of Bloomington v. Pollock*, 141 *id.* 346; *City of Joliet v. Blower*, 155 *id.* 414.) The rule thus uniformly announced has never been qualified or limited by the object or purpose which the municipality had in view in ordering the change. It is true that the term ‘police power’ is not mentioned in the opinion of the court in these cases, nor, so far as we know, was it referred to in the briefs and arguments of counsel; but the question argued and decided in each of them was the liability of the city, under the foregoing clause of the constitution, in making the change in the grade of the street, and it was in every case held that it was liable.”

In the case of *Spalding v. M. & I. Ry. Co.*, 225 Ill. 585, the court said, at page 590:

“* * * Where the fee of a street is in the city, any damages to abutting property owners which may accrue from allowing a railroad track in a street are merely consequential. In such case we have held that there is no physical taking of the land and that injunction will not lie, the remedy being at law. But the construction of a steam railway in a city street, where the fee belongs to abutting property owners, has been frequently held by this court to create an additional servitude as not one of the ordinary uses.”

And in the case of *Davenport Bridge Co. v. Johnson*, *supra*, the court said, at page 483:

“* * * When the defendants undertook to enter upon the premises in front of complainants' lots the latter obtained injunctions. The fact that other companies had entered upon and occupied the land and complainants did not object furnishes no ground for claiming that they abandoned the constitutional guaranties as against defendants. When a new servitude is threatened by a new party, we see no reason why they may not object until compensation is made or why they should be barred from seeking the protection of the court.”

In the case of *Bond v. Penn. Co.*, 171 Ill. 508, at page 517, the court said:

“* * * In *Hall v. People*, 57 Ill. 307, this court said (p. 316): ‘No man can be compelled to part with his property without just compensation. This is a constitutional right that he cannot be deprived of by any statute. No corporation, public or private, can appropriate the property of any one to their own use without first tendering or paying the damages assessed under the forms of the law. *The party ought not to be driven to his action against a corporation, responsible or irresponsible, for his damages.* This would be to take his property without first making compensation, and would be a plain violation of a constitutional right.’ In *Commissioners of Highways v. Durham*, 43 Ill. 86, it was held that it was proper to enjoin the attempted opening of a road before the damages to a land owner had been adjusted. Mr. Lewis, in his work on Eminent Domain (Sec. 631) says that ‘it is now almost universally held that an entry upon private property under color of the eminent domain power will be enjoined until the right to make such entry

has been perfected by a full compliance with the constitution and the laws.' "

Were there no physical taking of property and merely consequential damage by reason of the improvement, the rule as to the time of payment of compensation is different, and it need not then be made in advance.

South Park Comrs. v. Ward & Co., 248 Ill. 299, 310-11.

Penn. Mutual Life Ins. Co. et al. v. Heiss et al., 141 Ill. 35, 55, 57, 58, 59, 61 and 62.

County of Mercer v. Wolff, 237 Ill. 74 and 76.

Elser v. Village of Gross Point, 223 Ill. 230, 243.

Parker v. Catholic Bishop et al., 146 Ill. 158, 165, 166 and 168.

Lorie v. North Chicago City Ry. Co. et al., 32 Fed. 270-271.

The fee to this street being in the abutting owners, I am of the opinion that the contemplated construction as outlined by Mr. Pihlfeldt, not only brings these cases within the constitution as to "damage," but will constitute an actual physical injury to the property, and that the owners are entitled to compensation for same and may enjoin the city from proceeding with the work until such compensation is made.

Yours truly,

ANTON T. ZEMAN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Contractor's Claims Concerning Contagious Disease Hospital.

January 6, 1916.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

We have your letter dated December 7, 1915, with enclosure of the complete file relating to the claim of John J. Brittain Company for work done in the matter of the installa-

tion of certain caissons under the No. 3 Ward Building of the Contagious Disease Hospital. We understand it is the desire of your committee that this department review the circumstances which give rise to the claim in question, giving especial consideration to the meaning and effect of the contract entered into by the commissioner of public works on behalf of the City of Chicago with said firm, and render an opinion (1) as to whether a legal obligation rests upon the city to reimburse said firm for expenditures incurred and to compensate it for work done in connection with the improvement in question in so far as said claim exceeds the sum of \$35,000, and (2) if no legal obligation exists, whether the City Council may now lawfully take any affirmative action with a view to recognizing the justice of this claim and making an appropriation therefor.

Considerable uncertainty appears to have existed as to the precise meaning of the contract. By its terms John J. Brittain Company agreed "to do the necessary shoring, excavation, concrete work, or additional foundation," or to construct, "approximately fifty caissons," under the foundations of the No. 3 Ward Building, said work to be "done in accordance with the directions of and satisfactory to the Department of Public Works." The contract provided further that the firm should receive upon completion of the work a sum equal to the market price of the labor and material used in doing said work, plus 10 per cent thereof, but that in no event should the amount to be paid under the contract exceed the sum of \$35,000 in accordance with an order adopted by the City Council on March 29, 1915. (C. P., p. 4117.) The council order referred to authorized the commissioner of public works to enter into said contract and provided that the total amount of work was "not to exceed \$35,000, or the expense of any one caisson to exceed \$700." In the letters to your committee dated July 14, 1915, and October 29, 1915, the commissioner of public works has referred to the apparent understanding of the John J. Brittain Company that payment for the work under this contract was to be upon the basis of the market price of labor and material plus 10 per cent and that the \$35,000 was an initial appropriation only, rather

than a sum which was supposed to cover all of the work contemplated by the contract.

We are clearly of the opinion that the contract must be construed as requiring the construction of not exceeding fifty caissons, the number to be determined by the commissioner of public works, at the rate of \$700 for each caisson. It was evidently not thought that more than fifty caissons would be necessary to properly support the building, for the contract and council order placed a limit of \$35,000 upon the amount to be expended. Nevertheless, there have been constructed, apparently with the approval of the commissioner of public works, fifty-five caissons, which at \$700 per caisson would equitably entitle John J. Brittain Company to \$38,500, or \$3,500 in excess of the sum appropriated by the City Council.

In the opinions formerly rendered by this department in reference to this claim, we have advised your committee that no legal obligation rests upon the city to pay the claim under consideration in so far as the same exceeds \$35,000. The ordinances of the city expressly provide that no money shall be paid under any contract in excess of the sums stated and that no extra work under any contract shall be authorized by the commissioner of public works which necessitates additional expenditures without referring the matter to the City Council. (Chicago Code of 1911, Section 2102.) Article IX of the Cities and Villages Act (Revised Statutes, Paragraph 116a) provides that a contract for a public improvement, when the expense thereof exceeds \$500, shall be let to the lowest responsible bidder or be authorized by a two-thirds vote of the City Council. As stated more fully in the opinions above referred to, where the provisions of the above ordinance and statute are not followed in the the case of any contract, no liability will be created even though the work done thereunder is accepted and benefits are received by the city.

Roemheld v. City of Chicago, 231 Ill. 467.

It is well established, however, that where an invalid contract is entered into between a municipal officer and a person who thereunder renders services to the city, the contract although giving rise to no legal obligation against the

city may in many cases be ratified by formal action of the proper municipal authorities or, if no particular procedure is required in the execution of municipal contracts, even by their acts or conduct.

Town of Bruce v. Dickey, 116 Ill. 527, 534.

People v. Spring Lake Dist., 253 Ill. 479, 501.

In the latter case the rule is summarized as follows:

“The principle is now firmly established that the doctrine of *ultra vires* is not applied (except in cases where the contract is prohibited by some rule of law) where its enforcement would enable the municipality to obtain an unconscionable advantage of the other party to the contract, and that municipal corporations, as well as private corporations and natural persons, are bound by the principles of common honesty and fair dealing. Contracts made by a municipality, which are merely *ultra vires* in a modified or secondary sense, may be ratified and any defect in the manner of exercising the power thereby cured, and the municipality may likewise estop itself by acts *in pais* from setting up the defense of *ultra vires*. (2 Dillon on Mun. Corp., 5th Ed., Sec. 797.)”

The question whether or not this principle may be applied in this case, where statute has prescribed in express terms the manner in which contracts of the nature of the one under consideration shall be entered into, is not free from difficulty. The higher courts of Illinois have given no decision in reference to the statute above mentioned, which has passed squarely on this question. We are of the opinion, however, that no reason exists for differentiating between the right of ratification under this statute and that which has often and clearly been asserted under statutory provisions of other states which have likewise prescribed the procedure by which municipal contracts shall be entered into. The general rule is that contracts which are *invalid* because of non-compliance with such statutes may be ratified by subsequent action of the proper municipal authorities, provided the procedure which is prescribed by the statutes for entering into the contracts is such that it may be followed in ratifying them. An instance where an invalid contract cannot be validated in this way is where statute requires that contracts be

let to the lowest bidder. (McQuillin on Municipal Corporations, Vol. 3, p. 2622.) Here, however, the City Council had the power by a two-thirds vote to authorize a contract for the extra five caissons, and it is established by many authorities that under statutes of this kind a contract which is *invalid* because the proper procedure has not been observed may be ratified by subsequent action of the council which follows the statutory requirements.

The case of *Pells v. City of Paxton*, 176 Ill. 318, which holds that contracts not entered into in the statutory manner may not be ratified, is distinguishable from the present case and is not an authority in deciding the question here considered. The statute in that case required contracts to be let to the lowest responsible bidder. Under such a statute it is clear that the council cannot ratify a contract, let without bids being taken, after the work is completed. The ratification must, of course, be by such action as would have made the contract valid if followed at the time the contract was entered into.

In *Town of Durango v. Pennington*, 8 Colo. 257, the court said:

“A contract not *ultra vires* may be ratified. The ratification, when properly made, is said to be equivalent to previous authority to make it, and operates to validate it from the time of its execution. But the ratification of an *invalid* contract, where an express contract is necessary to bind a municipal corporation in the first instance and where the contract is required to be made in a specified manner, requires the observance of the same formalities and provisions necessary to be complied with in the making of a valid contract. *McCracken v. City of San Francisco*, 17 Cal. 623; *Zottman v. San Francisco*, *supra*; *People v. Swift*, 31 Cal. 28.”

To the same effect are the following cases:

Grogan v. San Francisco, 18 Cal. 590, 608.

Hett v. Portsmouth, 73 N. H. 234, 236.

Gary v. Board of Chosen Freeholders, 44 N. J. L. 445.

Paul v. Seattle, 40 Wash. 294, 302.

State v. Milling Co., 156 Mo. 620, 634.

Mulligan v. City of Lexington, 126 Mo. App. 715.

26 Cyc. 672.

Dillon on Municipal Corporations, Vol. II, p. 1191(n).

By ratifying the action of the commissioner of public works in ordering five caissons in addition to those for which provision was made by the City Council in the order of March 29, 1915, the Brittain Company will become entitled, legally as well as equitably, to additional compensation amounting to \$3,500. The principles of ratification cannot, however, be extended to the balance of the claim under consideration, which it is said arose out of a misconception as to the effect of the contract and a belief that the necessary work required thereunder would be compensated for upon the basis of the cost of labor and material plus 10 per cent. We have already pointed out that the contract required the completion of this work at the rate of \$700 for each caisson, or \$35,000 for fifty, and that no legal obligation rests upon the city to pay more than this sum. The question now presents itself whether the City Council may take affirmative action with a view to recognizing the justice of the claim upon the basis of the recommendation made by the commissioner of public works to your committee and may make an appropriation therefor.

Article V of the Cities and Villages Act of 1872, Section 1, Paragraph Second, authorizes the City Council to appropriate money for corporate purposes only and thereby places a limitation upon the powers of the city, in effect prohibiting appropriations for any other than corporate purposes. Independently of this provision, moreover, it is well established that any appropriation of municipal funds which partakes of the nature of a donation is illegal, for the machinery of the city government must be confined in its operation to the fulfillment of municipal purposes.

City of Chicago v. Williams, 182 Ill. 135, 142.

Chicago v. P. C. C. & St. L. Ry. Co., 244 Ill. 220, 230.

Upon a careful consideration of the authorities both in this and other states with reference to the question whether

an appropriation may lawfully be made under the circumstances found in the present instance, we have arrived at the conclusion that the rule of law above referred to was not intended to prevent an appropriation by the City Council with a view to meeting a just or moral obligation arising out of services rendered or work done on behalf of the city and the benefits of which the city has received. While this precise question has not been passed upon in the courts of Illinois, it has been uniformly held in other states, where the question has been raised, that an appropriation may properly be made for the purpose of meeting an obligation of this kind.

In *Bailey v. Philadelphia*, 167 Pa. State, 569, the court considered the validity of an appropriation passed by the City Council to compensate a school supervisor for services rendered while her title to the position was in doubt and no compensation was received. The court said at page 572:

“Undoubtedly the legal claim of Miss Sherry was at an end when this ordinance was passed. She had no right which could have been enforced by action. But it does not follow that her claim was without merit. The committee of councils reported, on the contrary, after investigation, that it was founded on services rendered under claim and color of right and title, and was meritorious. Does the law prohibit the city from recognizing the moral obligation arising from these circumstances? We do not find anything that compels us to so hold. A moral obligation in law is defined as one ‘which cannot be enforced by action but which is binding on the party who incurs it, in conscience and according to natural justice,’ and again, a ‘duty which would be enforceable by law were it not for some positive rule, which, with a view to general benefit, exempts the party in that particular instance from legal liability.’ Am. & Eng. Ency. of Law, 716. * * * Councils, it is true, are trustees, and the law limits their expenditure of public money to public purposes, but they are also representatives of their constituents, and delegates of the city’s legislative powers, and there is nothing in the law or in sound public policy to prohibit the city from being honest, and paying its bona fide debts which are good in conscience and justice, though for sufficient other reasons, there is a general rule which prevents them from being enforceable by law.”

In *State v. St. Louis*, 174 Mo. 125, an ordinance was passed to reimburse a police officer for a judgment which was rendered against him for an injury unintentionally inflicted upon a bystander when in the course of his official duty he was endeavoring to kill a mad steer, which was endangering the lives of the public. The court said at page 148:

“An act or ordinance appropriating money to pay such expense would not be a donation of public money to an individual.”

In *The Morris and Essex Railroad Company v. The Mayor and Common Council of the City of Newark*, 76 N. J. L., 555, an agreement was entered into between the railroad companies and the City of Newark providing for the elevation and depression of their railroads in certain streets. The city agreed to pay, on the completion of the work, certain sums of money to the companies. It was contended that the payment of the stipulated sums should be regarded as a voluntary contribution and therefore prohibited by a constitutional provision providing that no donation or appropriation of money should be made by any municipal corporation to or for the use of any corporation. The court in the course of its opinion, at page 560, said:

“The payment of a recognized moral obligation assumed for services rendered has been held repeatedly by this court to be within the legislative power, and its discharge does not constitute a donation of the public funds.”

In *People v. Prendergast*, 202 N. Y. 188, 196, the court said:

“* * * It is argued that the amendment of 1910 virtually authorizes a gift of money belonging to a municipal corporation, and, hence, violates Section 10 of Article VIII of the constitution. * * * It is well settled that a statute authorizing the payment by municipal corporations of claims founded in justice and supported by a moral obligation does not conflict with this provision of the constitution.”

McQuillin on Municipal Corporations, Volume 5, Section 2168, states the rule as follows:

“While payment of claims which are neither legal nor equitable is an expenditure for other than public

purposes, yet the payment by municipal corporations of claims founded in justice and supported by a moral obligation only does not conflict with constitutional provision forbidding the making of gifts."

The conclusion which we have here reached is not at all affected or precluded by those statutory provisions which prescribe the procedure by which contracts for improvements shall be entered into. Paragraph 116a of the Cities and Villages Act, to which we have already referred, provides that any work or improvement shall, when the cost thereof shall exceed \$500 be done under contract let to the lowest responsible bidder or authorized by a two-thirds vote of the city council. It is to be observed that in the present instance this provision has been complied with, except as to the five extra caissons, the contract for which, as we have previously stated, may be ratified by a two-thirds vote of the city council. There is here no question as to compliance with this statutory requirement, but one as to the propriety for an additional appropriation for work done under a contract which was entered into in the statutory manner. Section 91 of the Cities and Villages Act provides that no contract shall be entered into by the City Council and no expense shall be incurred by any municipal officer unless an appropriation therefor is previously made. It has been clearly settled that this provision does not have the effect of invalidating a contract which is made before such appropriation is passed or of prohibiting the making of a subsequent appropriation therefor, but merely prohibits "the incurring of liability or expense *during the fiscal year* after the passage of the annual appropriation bill unless the object of the expenditure or liability shall have been included within the annual appropriation ordinance."

City of Danville v. Danville Water Co., 180 Ill. 235, 245.

City of Chicago v. Norton Milling Co., 196 Ill. 580.

Village of Harvey v. Wilson, 78 Ill. 544.

It follows that this section cannot be regarded as prohibiting an appropriation under the present circumstances.

In conclusion we will state that this opinion is not concerned as to the sum of money to which the Brittain Company in equity and fairness may be entitled. We do not wish to be understood as making any recommendation as to the payment, either wholly or in part, of the claim in question. Our only purpose in this opinion is to pass upon the legal question as to what action may properly be taken by the City Council in case a moral obligation is deemed to rest upon the city. We beg to call your attention, however, to the fact that your committee will be justified when considering the equities of the situation in reaching an independent determination as to the reasonable value of the services that have been rendered. If, for example, it appears from any information on hand that the claims advanced for labor and material are in any degree excessive it will be proper to take this into consideration. The amount to which the Brittain Company may equitably be entitled does not necessarily depend upon the provisions of the contract, which provide for compensation upon the basis of the cost of labor and material plus 10 per cent thereof, but rather upon what is in fact the reasonable value of the improvement which has been constructed and which the city now enjoys.

Our conclusions may therefore be stated as follows:

(1) The city is under no legal liability in excess of \$35,000 for the work done by John J. Brittain Company, but the City Council may, nevertheless, by a two-thirds vote ratify the contract calling for the construction of five extra caissons, and thus create an additional legal obligation to the extent of \$3,500 and form the basis of an additional appropriation therefor.

(2) It is further within the power of the City Council to consider the circumstances giving rise to the balance of the claim here under consideration and if it is believed that the city is under a moral obligation to pay this claim, wholly or in part, with a view to making compensation to the extent

of the reasonable value of the services rendered to the city, an appropriation may be made therefor in the usual manner.

We, herewith, return the complete file.

Yours very truly,

RALPH G. CRANDALL,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Expenditures Before Passage of Annual Appropriation Bill.

January 7, 1916.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

We are in receipt of your letter in which you ask for an order authorizing the comptroller to use Undistributed Special Assessment Fund moneys and about \$70,000 in addition thereto for the purpose of making good deficiencies in special assessment warrants caused by the withdrawal for collection of sundry special assessments because of defaults in payment.

You state that you are informed unofficially by the county collector that the amount of these withdrawals, as near as can be estimated, is upwards of \$186,000, and may reach \$200,000. You state further that there is now to the credit of the Special Assessment Fund Undistributed the sum of \$130,888.82, which could be applied to this purpose, but that it would be necessary to have authority to expend another \$70,000 in order to meet the necessities of the occasion.

The situation as outlined creates an emergency which, under the authority of the opinion of the Supreme Court in the case of *City of Danville v. Danville Water Company*, 180 Ill. 235, can be remedied by securing authority from the City Council to use the funds in question and to charge same against a lawful appropriation thereafter made, when the Annual Appropriation Bill is passed. The language of the court with reference to this particular point is as follows:

“Within that period of the first quarter of the fiscal year which may ensue prior to the passage of an annual appropriation bill or ordinance, the City Council may enter into any contract and incur any expense not otherwise unlawful without an appropriation therefor having been previously made, but may include the appropriation therefor in the general appropriation bill to be thereafter enacted within the said first quarter of the fiscal year.” (*City of Danville v. Danville Water Co.*, 180 Ill. 235-245.)

If the City Council makes provision for the payment of the deficiencies above mentioned, it is bound to make appropriation therefor when it passes the Annual Appropriation ordinance.

We have therefore prepared the draft of an order which we submit herewith, authorizing the city comptroller and city treasurer to expend the funds in question for that purpose.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

**Lien Against Fund Due, or to Become Due to Contractors
for Public Improvements.**

January 10, 1916.

MR. FRED W. BENTLEY, Attorney at Law.

Dear Sir:

Your communication of recent date addressed to the corporation counsel with reference to certain moneys due your client under a contract for street improvements, and now held by the city comptroller, has been referred to me. In reply thereto, I beg to say that we have taken up the above matter with a representative of the city comptroller's office, and were informed that the comptroller was compelled to hold the

money due your client under the contract for the reason that the Washington Construction Company had filed notice bearing date of March 11, 1914, for a lien amounting to \$1,362, against your client, Mr. D. A. Thatcher.

Paragraph 37, Chapter 82 of Hurd's Revised Statutes of 1913 (Section 23), creates the right to a lien against a fund due or to become due for work done or material furnished for a public improvement, and reads as follows:

"Any person who shall furnish material, apparatus, fixtures, machinery, or labor to any contractor for a public improvement in this state, shall have a lien on the money, bonds or warrants due or to become due such contractor for such improvement: *Provided*, such person shall, before payment or delivery thereof is made to such contractor, notify the officials of the state, county, township, city or municipality whose duty it is to pay such contractor of his claim by a written notice. It shall be the duty of such official so notified to withhold a sufficient amount to pay such claim until it is admitted or by law established, and thereupon to pay the amount thereof to such person, and such payment shall be a credit on the contract price to be paid such contractor. Any officer violating the duty hereby imposed upon him shall be liable on his official bond to the person serving such notice for the damages resulting from such violation which may be recovered in an action at law in any court of competent jurisdiction. There shall be no preference between the persons serving such notice, but all shall be paid *pro rata* in proportion to the amount due under their respective contracts." (Constitutional; *West Chicago Park Comrs. v. Western Granite Co.*, 200 Ill. 527.)

The city comptroller, under the above section, would be liable on his official bond to the party serving the notice for damages resulting from a violation of his duty, which may be recovered in an action at law in any court of competent jurisdiction.

I am, therefore, of the opinion that the city comptroller is justified in holding the money due your client under the contract until the claim for lien has been adjudicated either by agreement or judicial proceedings. Your suggestion that your client is willing to give any bond necessary to protect the comptroller in order to get the vouchers and checks for

the reserve, does not meet with the approval of the comptroller, and there is no provision of the statute authorizing him to accept a bond in a matter of this kind.

Yours very truly,

CHARLES E. PEACE,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

**Proposed Ordinance Requiring Instruction for Motormen
and Conductors of Elevated and Surface Cars.**

January 10, 1916.

HON. OTTO KERNER, Chairman, Committee on Judiciary, State
Legislation, Elections and Rules.

Dear Sir:

Your request for an opinion on the validity of a proposed ordinance now pending before your committee requiring instruction for motormen and conductors on the elevated and surface street car lines of the city was referred to the undersigned for attention.

The proposed ordinance prohibits any person from acting as a motorman on an elevated car unless he shall have first received at least twenty-one days of instruction on elevated *street* cars in the City of Chicago under the supervision of a competent instructor, or unless at the time of the passage of the ordinance he shall have had thirty days' actual experience as a motorman on the elevated railways of this city.

In the case of conductors and guards of elevated railroad cars the ordinance requires ten days of instructions or fifteen days of actual experience; motormen of surface cars are required to have fifteen days of instruction or thirty days of actual experience; and conductors of surface cars are required to have fourteen days of instruction or thirty days of actual experience.

After a careful examination of the authorities bearing on

the question involved we have arrived at the conclusion that the ordinance could not be sustained in its present form.

Whatever regulation of the kind in question that may be lawful must be imposed under the general police powers of the community, as distinguished from any other power which the municipality has to regulate public service corporations. This would be true even if the ordinance was directed at the companies themselves instead of at the persons who seek to be or are employed by them.

Such being the case, an ordinance contemplating such an extreme exercise of the police power would be subject to the test of reasonableness as to whether it is adapted to the end sought and tends to promote safety, and whether the necessities of the case require it. The question of deprivation of property without due process of law and the question of discrimination would also have to be considered.

As applied to either the corporations operating them or the men employed, the municipality may make such police regulations concerning street and elevated railroad cars as are necessary for the safety of the persons and property of the public; and an ordinance showing on its face it is intended to provide a safeguard against danger to the public would be presumed to be valid and the burden of proof would be on one who attacks its validity. (*People v. Detroit United Ry.*, 134 Mich. 682.)

Acting in pursuance of this general rule the courts have gone far in sustaining regulations as to street railroads which are of an exceedingly drastic nature, holding that in the absence of facts showing that an unreasonable burden working a deprivation of property has been imposed the legislative acts should not be disturbed.

Such regulation has even been upheld when it extended to the manner of operating the cars, the number of employes on them and the licensing of the conductors of same.

“Regulations which require a street railroad company to have a conductor in charge of each car, or to have a driver or motorman and conductor or other agent on each car to control the car and passengers, or

which require conductors to be licensed, have been held to be reasonable regulations."

36 Cyc. 1457, and authorities cited.

See also authorities in 44 Century Digest, Col. 3273.

We have, however, been unable to find any case where the qualifications of employes were fixed by statute or ordinance on the basis of a period of instruction, the time employed or the length of service in some inferior capacity, and we doubt whether such regulation would be held reasonable regardless of whether the instruction or experience is limited to this city or not.

In the case of steam railroads it has sometimes been held that a provision requiring an examination or test, or a period of service for acquiring experience, comes within the police powers of the state.

Nashville, C. & St. L. Ry. Co. v. State, 83 Ala. 71, (affirmed in 128 U. S. 98).

Smith v. Alabama, 124 U. S. 465.

Simpson v. Geary, 204 Fed. 507.

On the theory that the operation of a street or elevated car in a crowded city requires skill and experience it is possible that a test calling for an examination or even a qualification based on experience might be enforced. But on the other hand the courts have jealously guarded the rights of persons to labor and to employ labor, holding that the right to work for compensation was property within the meaning of that word in the 14th Amendment to the Constitution of the United States. So rigidly have they held down the power that an examination of the authorities would almost lead one to the conclusion that the weight of authority was against the cases cited above, although in fact there is no real conflict of authority.

A recent case decided by the highest tribunal in the land draws the distinction very clearly.

"The necessity of avoiding the fixing of arbitrary tests by which competent persons would be excluded from lawful employment is also recognized in *Smith v. Alabama*, 124 U. S. 465, 480, 31 L. Ed. 508, 513, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564. There the act pro-

vided that all engineers should secure a license, and in sustaining the validity of the statute the court pointed out that the law 'requires that every locomotive engineer shall have a license, but it does not limit the number of persons who may be licensed, or prescribe any arbitrary conditions of the grant.' This and the other cases establish, beyond controversy, that, in the exercise of the police power, the state may prescribe tests and require a license from those who wish to engage in or remain in a private calling affecting the public safety. The liberty of contract is, of course, not unlimited; but there is no reason or authority for the proposition that conditions may be imposed by statute which will admit some who are competent and arbitrarily exclude others who are equally competent to labor on terms mutually satisfactory to employer and employee. None of the cases sustains the proposition that, under the power to secure the public safety, a privileged class can be created and be then given a monopoly of the right to work in a special or favored position. Such a statute would shut the door, without a hearing, upon many persons and classes of persons who were competent to serve, and would deprive them of the liberty to work in a calling they were qualified to fill with safety to the public and benefit to themselves.

"The statute here under consideration permits those who had been freight conductors for two years before the law was passed, and those who for two years have been freight conductors in other states, to act in the same capacity in the State of Texas. But barring these exceptional cases, the act permits brakemen on freight trains to be promoted to the position of conductor on a freight train, but excludes all other citizens of the United States from the right to engage in such service. The statute does not require the brakeman to prove his fitness, though it does prevent all others from showing that they are competent. The act prescribes no other qualification for appointment as conductor than that for two years the applicant should have been a brakeman on a freight train, but affords no opportunity to any others to prove their fitness. It thus absolutely excludes the whole body of the public, including many railroad men, from the right to secure employment as conductor on a freight train."

Smith v. Texas, 233 U. S. 630.

After stating what is quoted above, the court in the case quoted goes on to point out other matters wherein the act is faulty in other particulars. The gist of this decision and all others along the same line is that provisions which favor a particular class or classes cannot be upheld, even though the general principle that the police power may control the employment is upheld.

A case which is very much in point is one decided by an Ohio Circuit Court, all three judges concurring, and affirmed without opinion by the Supreme Court. The act under review provided that it was unlawful to employ a conductor for a passenger train unless he had at least two years' experience as a conductor of a passenger, freight or construction train within six years next preceding the employment, but permitted the retention of conductors employed at the time of the passage of the act. The Circuit Court said:

"That is to say, a person who has been a conductor of passenger, freight or construction train for two years within the last six before the employment, may be employed without examination as to his competency; but a person so employed for a term one day less than two years, shall not be employed, however skillful and competent he may be; and a person who has been in the employ of the company for one day previous to the passage of the act may be retained, however incompetent and inexperienced he may be. The act creates arbitrarily two favored classes: Those who have had two years' experience in the last six before employment, and those who happened to be in the employ of the company at the time of the passage of the act. Similar and even more glaring inequalities might be pointed out governing the employment of engineers and others. The act prescribes no standard, and no test of efficiency; arbitrarily says who may labor at a given employment, and who may not, and fails to provide for the safety of the public, which must have been the purpose of any lawful exercise of the police power of the state." *C. C. C. & St. L. Ry. Co. v. State of Ohio*, 26 Ohio Circuit Court Reports 348.

Applying the principle which is upheld in the above quotations to the ordinance submitted by you, we find that

a person may be a motorman on an elevated railroad car if he has had thirty days' actual experience in Chicago, but cannot act as such if he has been similarly employed for ten years in the City of New York without being subjected to a course of instruction extending over twenty-one days. It will not do to say that the requirement for experience or instruction within the city is put into the ordinance to meet the necessities of the case on account of the peculiar conditions within the loop, where an inexperienced man might tie up the whole system, because it is possible for a man to have had such experience of thirty days within the city without ever coming near the loop.

What we have called attention to as showing a discrimination in the matter of employing motormen for elevated trains is even more pronounced in the case of the other operatives covered by the provisions of this ordinance. A motorman for thirty days on a cross town line on the west side may never have passed over the south side street for which he can be employed under the terms of the ordinance, while one who has operated cars for a long time in other cities cannot be employed. A man of no experience, after receiving fifteen days of instruction on our streets, may be employed, while an expert electrician who has had long experience in another place may not.

Another feature of the ordinance is that the experience called for is experience before the passage of the ordinance. It is manifestly absurd to say that thirty days' experience "at the time of the passage of this ordinance" is calculated to make a man more competent than a like period of experience at some time in the future.

We have pointed out some things which we regard as fatal to the ordinance under consideration, but have not touched on the question of reasonableness in case all these discriminatory elements are straightened out. This would undoubtedly be the subject of a contest, and it may be that such an ordinance would be attacked on other grounds. That being the case, it would be inadvisable to subject an ordinance of this character to the test before those provisions that are clearly illegal are eradicated.

On the ordinance as it stands we are constrained to hold that it would be invalid if enacted.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Claim of Court Ethel Yost Daughters of Columbia, for Compensation for Damages Caused by the Fire Department.

January 11, 1916.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

Your communication of recent date addressed to the corporation counsel wherein you enclosed a council order and correspondence in the claim of Court Ethel Yost Daughters of Columbia, a fraternal society, for compensation for damages to lodge regalia occasioned by a fire, it being claimed that the regalia was unnecessarily removed from the lockers and ruined by the Fire Department, has been referred to me.

In reply thereto, I beg to say that Mr. Tagg of this department has investigated the damages, and in his written report states that the facts as submitted are correct, and he desires to verify the statement of the claim as presented.

Admitting the facts as therein set forth are true, there is no liability against the city for a claim of this character. The city is not liable for the negligent acts of the officers or men of the Fire Department while in the discharge of their duty, because the doctrine of *respondeat superior* does not apply, and the city is not liable for the acts of its firemen.

Wilcox v. City of Chicago, 107 Ill. 334.

Craig v. City of Charleston, 180 Ill. 154.

City of Chicago v. Williams, 182 Ill. 135.

Tollefson v. City of Ottawa, 228 Ill. 134.

Blake v. City of Pontiac, 49 Ill. App. 553.

I am, therefore, of the opinion, that the city is not liable for the damages herein complained of.

Yours very truly,

CHARLES E. PEACE,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTIELSON,
Corporation Counsel.

Employment of Physicians in Public Schools.

January 11, 1916.

HON. JOHN DILL ROBERTSON, M. D., Secretary, Municipal Tuberculosis Sanitarium.

Dear Sir:

Your letter of December 6th, in which you ask to be advised as to the right of the board of directors of the Municipal Tuberculosis Sanitarium to employ and place in public schools fifty additional physicians and fifty additional nurses, "for the purpose of securing definite knowledge of the situation with regard to the extent of tuberculosis and predisposing conditions among school children," was referred to the undersigned for consideration and reply.

We find that the express provisions of the statute are in accord with the action as contemplated by the board of directors.

By referring to the act to enable cities and villages to establish and maintain public tuberculosis sanitariums (Hurd's Revised Statutes of 1913, Chapter 24, p. 464), we find that all power given to the directors are contained in Sections 6 and 7 of same. The second paragraph of Section 7 is as follows:

"Said board shall upon request or by consent of the party afflicted or the legal guardian, conservator or parents thereof, have the power to extend the benefits and privileges of such institution under proper rules and regulations into the homes of persons afflicted with tuberculosis and to furnish nurses, instruction,

medicines, attendance and all other aid necessary to effect a cure, and to do all things in and about the treatment and care of persons so afflicted which will have a tendency to effect a cure of the person or persons afflicted therewith and to stamp out tuberculosis in such city or village.”

The concluding clause of the above grants the power to the board

“To do all things in and about the treatment and cure of persons so afflicted which will have a tendency to effect a cure of the person or persons afflicted therewith and to stamp out tuberculosis in such city or village.”

It seems, therefore, that the board has the right to do all things within reason to stamp out tuberculosis in the city.

It is the general rule that where the law grants such broad powers as is set forth in the above clause, the general powers must be read in conjunction with the powers expressly conferred. This is the rule in regard to powers of municipal, public and quasi-public corporations, and while the courts have repeatedly held that a general grant of power cannot be understood to confer unlimited authority, yet the courts have also held that there should be such reasonable construction of the law as to allow the carrying out of the purposes of the law. This rule is laid down in *Barsaloux v. City of Chicago*, 245 Ill. 598. Therefore, it is reasonable, in order to stamp out tuberculosis in the city, to study and “secure definite knowledge of the situation with regard to the extent of tuberculosis and predisposing conditions among school children.”

This, however, must be done within the limits of the powers expressly conferred. The limit in this case is set forth in the last paragraph of the first clause of Section 7, which says: “Or in case of a minor or one under a disability the consent in writing of the parents, guardian or conservator, as the case may be, * * *,” must first be obtained.

In a noted case, (*Potts v. Breen*, 167 Ill. 67), the Supreme Court has voiced dislike for any rules or regulations which

are made compulsory upon the pupils and students in our public schools. The question presented in that case was whether the State Board of Health had the power to impose, as a condition for admission to the public schools, the vaccination of pupils. The powers granted by statute seemed to be ample, and, if taken literally, would have authorized that board to impose the above conditions. However, the court held that the general powers granted must be reasonably construed.

Following out the express words of the statute, it seems that the reasonable intent is,

“To do all things which will have a tendency to stamp out tuberculosis in such city or village. * * *”

Therefore, when this paragraph is read in connection with the paragraph concerning obtaining first the consent in writing of the parent, guardian or conservator, and action taken accordingly, it seems clear that your board may employ and place in public schools fifty additional physicians and fifty additional nurses for the purpose of securing definite knowledge of the situation with regard to the extent of tuberculosis and predisposing conditions among school children.

Yours very truly,

CLIFFORD G. ROE,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Detective Agency License Fees.

January 12, 1916.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

We are in receipt of your letter concerning the refund of money paid for licenses to conduct detective bureaus based on the claims of Thomas McGuire and the Thiel Detective Service Company, the said claims and petitions ac-

companying same being attached to your letter. You ask for an opinion on the matters set out in these petitions.

A number of claims of this character were filed with the city comptroller and communications were also addressed to the corporation counsel by others who asked for the repayment of money paid to the city for such licenses.

In response to a request from the comptroller, we prepared an opinion relating to the rights of the parties making such claims, and we send a copy of same for the information and guidance of your committee. The gist of this opinion is that it is well settled that no party who has voluntarily paid money to a municipality for licenses can recover same, even though the ordinance under which it was exacted is afterwards held to be invalid.

It is also well settled that in order to substantiate a claim of duress where a party declares that he made such payments under compulsion, it is necessary to show more than a mere protest and more than a fancied danger of loss. The party who makes such a claim, in order to establish a case under which he is entitled to judgment for the money so paid, must show that he was threatened and that the threat was of so substantial a nature that he paid the money in order to save himself from arrest or to save his property from seizure.

In the two claims above referred to, which you have submitted to us, it is not contended that there was duress. In fact, the petitions simply state that the parties paid the money to the city, that the ordinance was subsequently held invalid and that the petitioners request that the money paid be returned to them. Under such circumstances, there seems to be no doubt as to the legal right of the city to retain the money.

This department on several occasions has advised your committee that if the City Council sees fit, notwithstanding the fact that there is no legal liability on the part of the city to re-pay money received in this way, it would not be unlawful for the City Council to appropriate money for the purpose of such re-payment. This holds good in the present instance, but we beg to advise you that the ordi-

nance under which license fees were paid by detective agencies was in force about ten years, that there are a large number of agencies who are demanding the money paid by them, and that the total amount to be repaid in case such a policy was adopted, would amount to a considerable sum, probably as much as sixty or seventy thousand dollars. Some of the agencies that have made such demands claim that the money was paid under actual duress, and in such cases we have advised them to file a claim with the city clerk and submit proof. If such claims are filed and you see fit to refer them to this department for consideration, we will take up each individual claim and state whether or not in our opinion the facts warrant the return of the money by reason of its being paid under duress.

As to the claims before us, however, we see no occasion for making a recommendation contrary to the opinion rendered to the city comptroller.

We return herewith the two claims and petitions attached thereto above referred to.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

GEO. E. CHIPMAN,
Acting Corporation Counsel.

Authority to Lay Switch Tracks in Certain Streets and Alleys.

January 4, 1916.

HON. WILLIAM R. MOORHOUSE, Commissioner of Public Works.

Dear Sir:

We, herewith, return ordinance submitted to us by the Bureau of Compensation in which authority is to be given and granted to James P. Mitchell and John F. Ehinger, their heirs, executors and assigns to construct, maintain

and use a single railroad switch track across the first east and west public alley south of West 18th street at a point approximately 110 feet east of the east line of South Canal street, which the Bureau of Compensation, through Mr. Hunter, informs us has already been laid without an ordinance or permission from the commissioner of public works, and their request for an opinion as to whether or not the commissioner of public works acting with the Police Department would have the right to tear up said tracks mentioned in the ordinance and also to tear up the tracks shown in red on the plat marked "Hunter, November 17, 1915," which they also claim were laid without permission. We shall take up the legal status of the tracks laid down in the streets and alleys separately.

As to Lumber street, we find in the Special Ordinances of 1898, Volume 1, page 431, an ordinance authorizing the Chicago, Burlington & Quincy Railroad Company to maintain and operate railroad tracks in 22nd street and in Lumber street. (Passed October 4, 1886, accepted October 18, 1886.) Section 1 of said ordinance provides as follows:

"§ 1. LUMBER STREET AND TWENTY-SECOND STREET—CONDITIONS.) *Be it ordained by the City Council of the City of Chicago:* 1. That permission and authority be and the same are hereby given to the Chicago, Burlington & Quincy Railroad Company, its successors and assigns, to lay down, maintain and operate a single track railroad upon Lumber street, from the intersection thereof with the right of way of the Joliet and Chicago Railroad Company, southwesterly as far as said street is laid out. And also in and upon 22nd street, from Brown to said Lumber street, with proper curve connecting the two tracks at junction of said 22nd street and Lumber street, and with switches, turn-outs and side tracks necessary to accommodate the owners and occupants of property, now or hereafter located on both sides of said Lumber and 22nd streets."

We also quote Sections 8 and 9 of said ordinance:

"§ 8. SUBJECT TO ORDINANCES.) This permission is granted subject to all general ordinances now in force,

or that may hereafter be passed concerning railroads in said city.

“§ 9. WHEN IN FORCE—ACCEPTANCE—GRANT, 20 YEARS IN 22ND STREET.) This ordinance shall take effect and be in force as soon as the same shall have been duly accepted by said company. Provided, however, that unless this ordinance shall be duly accepted within thirty days of the passage hereof, this ordinance shall be null and void; and

“Provided, further, that the right to operate that portion of said railroad track in 22nd street, lying between Brown and Halsted streets, shall terminate at the end of twenty years from the date of the passage of this ordinance.”

Under the terms of Section 1 of said ordinance, the authority given said railroad was not only to lay a single track in Lumber street but it also has the authority to lay switches, turnouts and side tracks necessary to accommodate the owners and occupants of property now or hereafter located on both sides of Lumber and 22nd streets and the only reservation or saving clause as to the time of said franchise is provided in Section 9 that the right to operate said railroad tracks in 22nd street lying between Brown and Halsted streets shall terminate at the end of twenty years from the date of the passage of the ordinance.

We are, therefore, of the opinion that under said ordinance permission and authority was given to the Chicago, Burlington & Quincy Railroad Company to lay the switch track now laid, as indicated in red ink on said plat, in Lumber street from the intersection thereof with the right of way of the Joliet and Chicago Railroad Company, southwesterly as far as said street is laid out providing a permit in writing was issued by the commissioner of public works in accordance with the terms of the ordinance and in compliance with Section 8 thereof which makes the same subject to the ordinance passed December 7, 1885, hereinafter set forth.

As to the permission to lay a switch track as set forth in the accompanying ordinance and which the Bureau of Com-

pensation claims has been laid out without permission, also as to the switch tracks laid across the two alleys bounded by Lumber and 18th streets on the north and south and Canal and Mechanic streets on the east and west, and also the switch track laid in the east side of Mechanic street south of 18th street, we note from the plat that the switch tracks connect with the main line of the Chicago, Burlington & Quincy Railroad Company and are laid principally upon private property (with the exception of these alleys and street) and are used entirely by the business and manufacturing concerns located thereon, and we assume the general public has very little, if any, use for the alleys and street as public thoroughfares.

Upon investigation of the plat in the Map Department Mechanic street and said alleys appear as public highways. We are unable to find any ordinance authorizing the Chicago, Burlington & Quincy Railroad Company or any person or corporation to lay tracks across said alleys or in Mechanic street.

The commissioner of public works of the City of Chicago has control over the streets of said city subject to the charter and ordinances of the city. (Chicago Code of 1911, Section 2069, p. 655.) We find in The Municipal Code (Supplement) of 1887, p. 65, "An ordinance governing the laying of tracks," which was passed on December 8, 1885, and which provides as follows:

"Be it Ordained by the City Council of the City of Chicago:

"§1. Hereafter it shall not be lawful for any person or corporation to lay any railroad track or tracks in or upon any of the streets, avenues, alleys or other public places within the City of Chicago, without first procuring a permit in writing therefor from the commissioner of public works.

"§2. Such permit shall be issued by the commissioner of public works in accordance with the terms of the respective ordinances under which the said tracks may be authorized to be laid, and shall specify in full the terms and conditions under which the same shall be constructed. For every such permit there shall

be paid to the city the cost of issuing the same and the expense of causing the construction under said permit to be superintended by the Department of Public Works.

"§3. Any person or corporation laying any track or tracks in violation of this ordinance or without complying with the terms of the permit herein required shall be subject to a fine of not less than one hundred dollars nor more than two hundred dollars and to a further fine of one hundred dollars a day for every day any such track or tracks shall remain in any such street, avenue, alley or other public place, where the same shall have been laid without said permit or in violation of the terms thereof.

"§4. This ordinance shall be in force from and after its passage and publication."

The above ordinance has since been amended, but the law governing the laying of tracks and providing a penalty therefor is the same. We refer you to The Chicago Code of 1911, Section 2145, p. 675.

We are, therefore, of the opinion that the switch tracks above mentioned were laid without any authority of law across said alleys and in said street. As the tracks appear to be laid upon the land controlled by one owner, we would advise before any action is taken upon the ordinance submitted that the parties who are interested in the switch tracks that cross said alleys and laid in Mechanic street be requested to appear before the commissioner of public works or the Bureau of Compensation for the purpose of adjusting, if possible, the whole matter. If this cannot be done, the commissioner of public works may serve a notice on the owner or owners of said tracks stating that the same were laid across said alleys and in said street without any ordinance having first been passed and any permit issued in accordance thereto by the commissioner of public works and that unless the same are removed within a certain number of days to be fixed by the commissioner of public works, the matter will be referred to the prose-

cuting attorney for action as provided for by the ordinance above set forth.

Yours very truly,
BENTON F. KLEEMAN,
Assistant Corporation Counsel.

Approved:
SAMUEL A. ETTELSON,
Corporation Counsel.

Telephone Bureau Test Calls.

January 10, 1916.

HON. JOHN SIMAN, City Clerk.

Dear Sir:

Your communication of December 21, relative to Telephone Bureau test calls, together with communications from the Department of Public Service to the Chicago Telephone Company, has been referred to me for attention.

In your communication you request that an opinion be rendered as to whether or not "the city has power to require the Chicago Telephone Company to consent to this plan." To definitely answer your inquiry, I will subdivide my opinion into two propositions:

I. Can the City of Chicago, through its Telephone Bureau, make test calls over the wires and equipment of the Chicago Telephone Company?

II. Granting that the Telephone Bureau of the City of Chicago has the power to make independent test calls, what action must be taken to require said company to permit the use of the Telephone Bureau test slugs?

I.

At the time of the enactment of the telephone ordinance of November 6, 1907, the conservation of public utilities and the operation and management of same was not so highly developed as at the present time.

The language of the telephone ordinance in question relative to service, maintenance of plant, equipment, etc., is not

so definite as it would be if the ordinance were drawn at the present time. The section in and by which the company agrees to maintain its service and equipment at the *highest practicable efficiency* is as follows:

"5. COMPANY TO ADOPT IMPROVEMENTS AND MAKE EXTENSIONS.) The Chicago Telephone Company shall, without extra charge therefor to its lessees, subscribers and patrons or the City of Chicago, at all times *maintain its plant*, system, wires, cables, electrical conductors and other equipment and service at the highest practicable efficiency, and to that end shall promptly adopt and put into use within the City of Chicago all available improved apparatus, appliances, equipment and methods of service, developed in the progress of the art of telephony, which shall have come into common use from time to time, or if experience has shown them to be practicable, and shall furnish the same to its said lessees, subscribers and patrons within said City of Chicago. Said Chicago Telephone Company shall at all times during the period of this grant so *operate its plant*, system, wires, cables, electrical conductors and other equipment as to give to its said lessees, subscribers and patrons the best service possible under then existing conditions of the art of telephony."

The following paragraph of the same ordinance and section imposes the duty on the commissioner of public works to enforce the above provisions:

"It shall be the duty of the commissioner of public works to enforce the provisions of this section and any ordinances or resolutions passed pursuant hereto, and he shall report any violations hereof to the City Council."

The paragraph and section have not been amended by any subsequent ordinance, and are, therefore, in full force and effect at the present time.

To enforce the provisions of the ordinance requires first of all an exact knowledge of the operating conditions of the telephone company, and this, in turn, implies a right and power to inspect and investigate to determine the exact conditions of the telephone service, wires, equipment, etc., at any particular time. Investigations and inspections can

not be properly carried on by observation alone of the plant and equipment in operation, but necessarily require actual operation of the equipment and appliances by the commissioner of public works or his employes. To properly perform these duties, the person charged with said duty must have access to all of the various classes of service. In the case of the nickel-box service, this cannot be accomplished without depositing a coin, while in the other classes it is possible to make test calls without the use of a coin and free of charge to the city; and as a great portion of the complaints arise in the use of the nickel-box service, it makes the Telephone Bureau test slug plan more desirable.

Sub-Section c of Section 6 of the ordinance of November 6, 1907, provides for nickel prepayment service

“by means of telephone instruments equipped with a coin box and slot or similar device for receiving five-cent pieces.”

As this last quoted phrase is a part of the same ordinance, it is to be considered and construed in relation to the whole ordinance under the established rule of construction.

The courts have held in numerous decisions that it is an established rule of construction of statutes (ordinances) that the intention of the lawmakers is to be ascertained from a view of the whole, and every part of the statute (ordinances) taken together and compared.

Gilbert v. Morgan, 98 Ill. 281.

Hamilton v. State, 102 Ill. 367, and others.

Thus, being a part of the same ordinance, the drafters of the ordinance of November 6, 1907, must be presumed to have had under consideration at the same time this particular class of service when drafting Section 5 relative to the maintenance and operation of telephone service at the *highest practicable efficiency*. It also follows that it is the duty of the commissioner of public service to enforce the provisions of Section 5 relative to maintenance and operation of this class of service in exactly the same manner as all other classes at the *highest practicable efficiency*, which cannot be done without depositing a coin or a test slug.

From the foregoing sections I am, therefore, of the opinion that the language used in Section 5 of the telephone ordinance of November 6, 1907, is sufficiently broad to permit the commissioner of public works (or such other person or official as may be designated by the City Council) to make *test calls* over the wires, apparatus or appliances and equipment of the Chicago Telephone Company to determine the quality of service being rendered from time to time.

II.

The duties which were imposed upon the commissioner of public works under the November 6 telephone ordinance has been shifted from time to time by amendment of the above mentioned ordinance and by the establishment of the Telephone Bureau and, later, the Department of Public Service, as will be shown by the following sections of various ordinances.

Section 4 of the amendatory ordinance of May 26, 1913 (Council Journal, pages 625 to 638), provides that:

“It shall be the duty of the city electrician or any other person or body designated for that purpose by the City Council to examine the grounds of all reasonable complaints * * *”

made to him in respect to the alleged violations of the November 6, 1907, ordinance or of the amendatory ordinance of May 26, 1913, and requires him to make reports of such complaints to the Committee on Gas, Oil and Electric Light of the City Council.

Paragraph 2 of Section 4 of said ordinance provides that:

“It is expressly understood and agreed that the City Council * * * may at any time * * * designate or appoint any person or official, bureau, commission or other body to perform any or all of the duties and exercise any or all of the powers which said ordinance of November 6 or this ordinance provide shall be performed.”

Immediately subsequent to the enactment of this amendatory ordinance, an ordinance creating a Telephone Bureau

was enacted May 26, 1913 (Council Journal, pages 639-40). Section 2 thereof created the office of telephone commissioner, and Section 4 of said ordinance, in outlining the duties of said commissioner, required the said commissioner

*"to receive complaints and to examine the grounds of all reasonable complaints in respect to alleged violations of any ordinance that may now or hereafter be in force in the City of Chicago authorizing any person or corporation to construct, maintain or operate a line of telephone wires in the City of Chicago * * * and to take such proceeding and action in respect to such complaints for the purpose of adjusting same and enforcing the provisions of any such ordinance or ordinances as the circumstances may warrant or require."*

On March 16, 1914, by ordinance passed by the City Council (Council Journal, pages 4451-2) there was created a Department of Public Service, and said ordinance, in paragraphs 2, 3 and 4, transferred various bureaus, including the Telephone Bureau, to the Department of Public Service. Section 2 of said ordinance created the office of commissioner of public service. Section 5 of said ordinance, relative to the powers of the commissioner of public service therein created, provides as follows:

"(Section 5. POWERS.) Said department shall enforce all ordinances, orders and resolutions in respect to public utilities now or hereafter in force in the city, and shall enforce all laws in respect to public utilities now or hereafter in force under and by which power and authority are conferred upon the city."

Section 6 of said ordinance outlines the duties and specifically states that:

"the department shall make investigation of such public utilities and shall collect and preserve under convenient form and index necessary, useful and valuable information, reports, statistics and other data relating to the regulation of rates, the furnishing or supplying of any public service, product or commodity to the public."

And in Section 7, relative to complaints, the commissioner of public service is required to receive all complaints against any public utility and "shall investigate and examine the

grounds of all reasonable complaints." Thus the duty of investigating complaints against the Chicago Telephone Company and relative to enforcing the provisions of the present Chicago Telephone Company ordinances and amendments thereof is vested in the commissioner of public service.

The proposed plan of making test calls over the wires of the company is within the province of the commissioner of public service, and it becomes his duty, under the ordinances, if interfered with, to call the attention of the City Council to the matter, and the City Council can, if it so desires, invoke the powers which it has under the seventeenth section of the November 6th ordinance or under Section 6 (Council Journal, page 638, May 26, 1913) of the amendatory ordinance, which refer to breach of conditions and forfeiture of the grant.

In making *test calls*, the cost to the company of handling each test call is the same as for the ordinary call by a subscriber, and on a complaint by a subscriber, where the commissioner of public service makes a *test call* over a measured service line, the expense of making the call falls on the subscriber, while in the case of the flat rate the expense, for the extra call, is borne by the company, and in the nickel-box service the city is compelled to make an outlay at the rate of five cents per call.

Under the ordinance of November 6, 1907, *test calls* under this class of service should be free to the city.

The ordinance proposed and the permissive use thereunder of Telephone Bureau test slugs would do away with the question of expense to the city and place it to a large extent upon the company.

The ordinance which is herewith submitted provides for the collection of test slugs, tabulation of same, and return by the company to the commissioner of public service. This necessitates additional labor and additional cost to the company which was not contemplated in the original or amendatory ordinance, and which can hardly be implied from the language of Section 5 of the November 6th ordinance. This imposes a new duty upon the telephone company, and a special undertaking on their part, and the im-

position of these obligations by the city requires inquiry and investigation as to the cost of performing such services by the telephone company.

The telephone ordinances above referred to are contract ordinances, and the provisions of same cannot be changed except by consent of the parties hereto. Inasmuch as there is no provision made for the collection of telephone test slugs, tabulation of same and their return to the commissioner of public service, it would be necessary to have an agreement between the Chicago Telephone Company and the city as to the compensation to be paid for said service to obviate the argument by the Chicago Telephone Company that the extra duties are in the nature of an additional compensation to the city or expense to them.

In conclusion hereof, I am of the opinion that the City of Chicago has the *power to require* the Chicago Telephone Company to permit the commissioner of public service to make *test calls, without charge* over the wires, equipment and apparatus of the Chicago Telephone Company to determine *the quality of service* being from time to time rendered in any class of service provided by ordinance; and I am further of the opinion that, inasmuch as the proposed plan of using Telephone Bureau test slugs requires the Chicago Telephone Company to collect said slugs found in the coin boxes of said company, to audit same by tabulating the prefix and the number of the subscriber and the number of standard Telephone Bureau test slugs, found in their respective coin boxes, and to return all such test slugs to the Department of Public Service; all of which are duties and obligations not heretofore contemplated in the telephone ordinances, and should the ordinance proposed be enacted by the City Council containing said extra duties and obligations, as hereinabove outlined, that the ordinance must be a contract ordinance and be accepted in the manner provided by law.

Very truly yours,

DANIEL A. ROBERTS,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

**Damages Sustained by Reason of a Failure to Remove the
Carcass of a Dead Horse.**

January 18, 1916.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir :

Your inquiry of December 31, 1915, relative to the claim of Peter Ness of 373 Kensington avenue, has been assigned to me for attention. I, therefore, wish to make reply as follows:

From an investigation which this department has caused to be made, it appears that one Peter Ness conducted a retail bakery shop at No. 11209 Michigan avenue, and that on July 2, 1914, about 10:00 o'clock in the forenoon, a horse, which was overcome by reason of the heat, fell in front of his establishment and died shortly thereafter. The police were notified, but for some unknown reason the carcass of the horse was not removed until July 4. Therefore, because of the stench and offensive odor, as well as the number of large flies which swarmed about his place of business, Mr. Ness was unable to dispose of his prepared stock, and in consequence thereof he sustained damages. Such being the case, he contends that he should be compensated for the actual loss sustained by him because of the failure or negligence of the city in removing the carcass at once upon notification.

The question to be passed upon we believe to be as follows:

First. What is the duty of the municipality relative to the cleaning of its streets and the removing of garbage? If there be a duty, or if the city undertakes to perform such function, does it act in its governmental or corporate capacity?

Second. If acting in its governmental capacity, can it be compelled to respond in damages to one for loss of business or profit sustained by reason of a nuisance which exists, which was neither created nor maintained by it?

In answer to our first proposition, we believe that the city, in undertaking to clean its streets and remove garbage, is performing a public service. This duty is to be distinguished from a corporate duty, and is like that of the fire, police or health departments, and the specific duties above mentioned are performed under the supervision of the latter department. In the undertaking of such work it is to be taken into consideration that the corporation is engaged in the performance of a public service in which it has no particular interest, and from which it derives no special benefit or advantage in its corporate capacity, but one which it is bound to see performed in pursuance of a duty imposed by law for the benefit and general welfare of its inhabitants.

It was said by the Supreme Court of Wisconsin, in the case of *Kuehn v. City of Milwaukee*, 92 Wis. 263:

“A city has exclusive power over streets within the corporate limits and the cleaning of its streets cannot be controlled by the courts. If unavoidable injury results in such work no liability ensues, because the doing of what the law authorizes cannot be a nuisance so as to give a right of action.”

The Appellate Court of Indiana, passing upon a like or similar question, makes use of the following language:

“In the collection of garbage and removing it from its streets and alleys the city was exercising the authority conferred upon it by the Legislature; that in exercising such powers the city stood in the place of the state; and that, as the state assumes no responsibility in the discharge of its governmental duties, the city as a branch department of the state, likewise assumes no liability in the discharge of such duties.”

This question has seemed to be of sufficient importance to warrant a general perusal of the decisions handed down by the various learned courts, and in doing so we find little diversity of opinion, especially where the preservation of the public health is involved. The preserving of the public health is but a portion of the sovereign power delegated to a corporate body, and must be exercised. Judge Atkinson of the Supreme Court of Georgia, in *Love v. City of Atlanta*, 95 Ga. 130, has this to say, and there is nothing equivocal in the same:

“The duty of keeping the streets clear of putrid and other substances offensive to the sense of smell, and which tend to imperil the public health, devolves under the charter of Atlanta upon the Board of Health of that city; and the functions of this department of the city government, being governmental, and not purely administrative in their character, it follows that if, in the exercise of such functions, and in this discharge of the duties devolving upon the department thereunder, a private citizen is injured by the negligence of one of its servants in and about such work, no right of action arises against the city.”

And such is the duty which devolves upon the city in this case in question, the powers conferred by charter being identical. There can be little, if any, doubt as to the capacity in which the city acts when called upon to perform such duty as in this particular instance.

As to our second proposition, the law is equally clear, and an abundance of cases may be cited which hold that one cannot recover against a municipality for damages sustained by reason of injury through negligence or otherwise when such damage was sustained by reason of the municipality carrying out or performing one of its governmental functions.

While we cannot concede, because of attaching circumstances, that a nuisance was maintained, yet if we assume, for the sake of the argument, that such was actually the case, no liability would attach itself upon the city, and we quote from the following reports in support of our position.

In the case of *Miller & Meyers v. The City of Newport News*, 101 Va. 432, the court said:

“For the failure to abate a nuisance in the street a city is not liable in damages for failure to exercise its legislative and discretionary powers to abate or remove a nuisance in its streets which it did not create nor does not maintain, and which does not render its streets unsafe.”

And again, in the following language, the Supreme Court of Tennessee expresses itself:

“Where one constructs a sewer on his premises and through it discharges filth and garbage into the street,

creating a nuisance to the injury of an adjacent lot owner, no action lies in favor of such adjacent owner against the city for failure to provide a sewer or for a failure to abate the nuisance, his remedy being against the person offending for maintaining a nuisance. The mere fact that a nuisance exists, and has occasioned an injury to the third person does not render the corporation liable provided the nuisance was not created nor maintained by the corporation itself." (*Chattanooga v. Reid*, 103 Tenn. 616.)

In conclusion, we are of the opinion that there is no liability on the part of the city for such alleged nuisance as existed, nor for the loss, if any, occasioned by reason of its existence.

Yours very truly,

H. L. BRIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTTELSON,

Corporation Counsel.

Objections to Commonwealth Edison Company Contract.

January 21, 1916.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

We have the communication addressed to this office, signed by the deputy comptroller, referring to the contract of the city with the Commonwealth Edison Company as authorized by order of the City Council passed December 10, 1915, as shown on pages 2541-2 of the Journal of Council Proceedings of said date, and asking for an opinion on certain points that appear to be in conflict with the law or ordinances.

The objections are passed upon without repeating them, in the order in which they appear in the said communication, as follows:

1. In the case of contracts for light or water extend-

ing over a term of years or for rent of premises for a term of years, a contract may be entered into in advance of an appropriation, on the theory that no liability accrues except as the service is rendered from month to month but no liability attaches to the city unless an appropriation is made in each year during the life of the contract.

Cain v. City of Wyoming, 104 Ill. App. 538.

East St. Louis v. Flanigan, 26 Ill. App. 449.

Town of Kankakee v. McGrew, 178 Ill. 74.

The authority to make such particular contract should be clearly shown by an ordinance duly passed by the City Council.

2. Sections 2107 and 2111 of The Chicago Code of 1911, provide for 15 per cent reservation of payment of money due on contracts for any sewer, public improvement or other work.

We are of the opinion that this provision of the code does not apply to contracts for supplies and may be omitted in the discretion of the city officer letting such contract for supplies.

3. The contract should be signed by the commissioner of gas and electricity in behalf of the city to conform to the order of the City Council.

4. The vote by which the execution of the contract in question was authorized in the City Council was Ayes, 61; Nays, 0.

This was a sufficient compliance with the ordinance governing the letting of contracts without advertising.

5. The City Council may authorize the execution of contracts before the passage of the appropriation bill, where the evident intent is to include the expense of such contract in the annual appropriation to be passed within the period fixed by law. In the case of *City of Danville v. Danville Water Co.*, 180 Ill. 235, the court says:

* * * "Section 2 makes it the duty of the City Council to pass a general annual appropriation bill within the first quarter of such fiscal year. The passage of such annual appropriation bill at any time within the first quarter of the fiscal year answers the demands of

the statute. Within that period of first quarter of the fiscal year which may ensue prior to the passage of an annual appropriation bill or ordinance, the City Council may enter into any contract and incur any expense not otherwise unlawful without an appropriation therefor having been previously made, but may include the appropriation therefor in the general appropriation bill to be thereafter enacted within the said first quarter of the fiscal year."

In the case of *Kimble et al. v. City of Peoria*, 140 Ill. 157, one of the objections to the judgment of the County Court confirming a special tax levied for the purpose of a public improvement, was that no appropriation had been previously made to pay for the costs of improvement of street and alley intersections embraced in the ordinance passed by the City Council. The court in discussing this objection says:

"In the report to the court, which is a part of the assessment roll, the commissioners show that they estimated the cost of the entire improvement at the sum of \$9,876.55, from which they deducted the estimated cost of improving the intersections of all streets and alleys embraced in the line of improvement, which was \$1,619.95, * * * (140 Ill., p. 162.)

"As to the objection that no appropriation had been made to pay for the cost of the paving of street and alley intersections, but little need be said. The ordinance providing for the improvement having been passed so late in the year 1890, it is apparent that it was not within the contemplation of the city to make the improvement in Hamilton street during the year 1890, but the plan no doubt was, to pass the ordinance in December, 1890, and obtain a confirmation of the tax assessment at an early date in 1891, and make the improvement in that year. As the fiscal year of 1891 did not begin until January 1, 1891, the City Council had ample time, during the first quarter of the fiscal year, to make the appropriation to cover the cost of the improvement at the street and alley intersections."

6. This question has been fully covered in the answer submitted to question numbered 5.

7. The requirement for a bond is a provision of the

code and should be waived by ordinance, as our courts have decided that an ordinance cannot be amended or set aside by a resolution or order of the City Council, except where the authority to do so is provided for in the ordinance relating to the subject.

We attach form of ordinance which will meet the objections herein mentioned and suggest that the City Council be requested to pass the same.

Respectfully submitted,

EDWARD H. WRIGHT,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Rights of Discharged Employes with Respect to Municipal Pension Fund.

January 22, 1916.

THE BOARD OF TRUSTEES OF THE

MUNICIPAL PENSION FUND, CHICAGO, ILLINOIS.

Dear Sirs:

We are in receipt of your favor of December 23rd asking us to define the rights of an employe who worked at least twenty years for the City of Chicago and who has been or may be discharged from the service of the city before reaching the age of fifty-five years and to state whether or not the said employe will have a right to pay into the pension fund under Section 8 of the Municipal Pension Act the same as an employe who might retire of his own volition. In reply we beg to advise you that Section 8 of the Municipal Pension Fund Act provides in part as follows:

“Except as hereinafter provided in Section 9½ of this act, any employe who has been in the service of such city, village or town for a period of not less than twenty (20) years, and who shall retire from the service of such city, village or town before attaining the age of fifty-five (55) years shall have the right to con-

tinue paying into said fund monthly, at the prescribed rate and may thereby remain in good standing in said fund and shall have the right to become a beneficiary upon attaining the age of fifty-five (55) years, not however, until five (5) years from and after the date when this act is in force and effect.”

Article 6 of Section 4 provides as follows:

“Said board shall have power * * *

“To authorize the payment to any employe who may be separated from the service of such city, village or town by the abolishment of his or her position, before such employe shall have qualified for a pension of an amount equal to the amount deducted from the salary or wages of such employe and applied to the fund hereby created, to any employe who may be separated from the service of such city, village or town by resignation or discharge before such employe shall have qualified for a pension * * * of an amount equal to one-half of the amount deducted from the salary or wages of such employe and applied to the fund hereby created.”

In order to ascertain the intention of the Legislature it is necessary to construe Sections 4 and 8 together. Section 4 authorizes the board to make a refund to any employe, who may resign or be discharged from the city before having completed a service of twenty years of an amount equal to one-half of the amount contributed by said employe to the Municipal Pension Fund. Section 8 authorizes the board to accept monthly payments from any city employe eligible to participate in the Municipal Pension Fund who has completed a service of twenty years and has retired before reaching the age of fifty-five years. Section 8 does not limit the mode of retirement, and from a careful reading and consideration of the entire Municipal Pension Act and particularly upon consideration of Sections 4 and 8 of said act we are of the opinion that it was the intention of the Legislature to grant a pension to all city employes eligible to participate under the terms and provisions of the Municipal Pension Fund Act when the said employes had completed a service of twenty years in the employ of the city, the payment of said pension to commence when the employe

reaches the age of fifty-five years, provided, however, that no person should receive a pension until five years after the date when the Pension Act went into force and effect.

It is clearly apparent from a reading of Section 8 that it was the intention of the Legislature to permit city employes who are eligible to participate in the Municipal Pension Fund and who had completed a service of twenty years in the employ of the city, who for any reason ceased to be employes after completing a service of twenty years before reaching the age of fifty-five years, to remain in good standing as participants in the pension fund by allowing them the privilege of contributing monthly during the period of time elapsing between their separation as employes of the city and their arriving at the age of fifty-five years, when under the provisions of the Municipal Pension Fund Act they would become eligible to a pension.

We, therefore, beg to advise you that an employe of the City of Chicago who has completed a service of twenty years as such employe and who is a participant in the Municipal Pension Fund and has ceased to be an employe of the city by reason of being discharged after completing a service of at least twenty years in the employ of the city and before reaching the age of fifty-five years, has the same right to preserve his rights as a participant in the said Municipal Pension Fund by contributing to the fund monthly during the time intervening between his discharge and his attaining the age of fifty-five years as an employe who has voluntarily resigned after a service of at least twenty years and before reaching the age of fifty-five years, and that it is the duty of the board to accept the sum of Two Dollars per month from all participants in the Municipal Pension Fund who have completed a service of twenty years as such employes and who retired after completing a period of twenty years' service before reaching the age of fifty-five years.

Very truly yours,

JAMES W. BREEN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Town Hall of Stickney.

January 24, 1916.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

Some time ago you were advised that suit had been started by the Town of Stickney for the purpose of obtaining pay for the proportionate share of the Town Hall which is due from the City of Chicago. The hearing on this matter is set for February 5, 1916. It is to be a summary proceeding under the statute. The Town of Stickney, being the moving party, will have the burden of proof and must show all the different things that it sets up in its petition in order to secure a decree requiring the city to pay for the property it has taken over. Nevertheless, we deem it proper to prepare for this hearing in order that no advantage may be taken of the city.

There should be an appraisal made of the property in question, both the real estate and the contents of the building, by parties who can qualify on the witness stand as competent to give the value of same. Everything contained in the petition should also be checked up. We suggest that the real estate agent of the city check up the descriptions given so as to see whether or not the division contemplated is correct.

The bonded indebtedness of the Town of Stickney should also be looked up, particularly with reference to this property, and the assessed value of the property of the Town of Stickney should be ascertained as a whole, and also in the parts involved. That is to say, the assessed value of the property in the Village of Clearing, in the other territory added besides the Village of Clearing, and the balance that still remains in the Town of Stickney should be separately figured out.

Your accountants ought also to figure over the values according to the appraisal made and according to the statements made in the petition, so that the exact amount due from the city, based on either figure, can be arrived at.

For the purpose of enabling you to proceed intelligently in this matter, we enclose herewith a copy of the petition filed in court. We would suggest that this work be done as soon as possible in order that we may be prepared at the time of the hearing.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Telephones Within Neighborhood Boundaries.

January 25, 1916.

HON. JOHN P. GARNER, Commissioner of Public Service.

Dear Sir:

Your communication of recent date, relative to neighborhood boundaries, has been referred to me for an opinion. In reply I beg to state that the telephone service to be rendered under the ordinance of November 6, 1907 and May 26, 1913, provide that the service shall be uniform and without discrimination to subscribers of the same class or kind of service. Section 6 of the ordinance of November 6, 1907, provides as follows:

“MAXIMUM RATES FIXED—SERVICE AND EQUIPMENT.)
Said Chicago Telephone Company during the term of this ordinance shall furnish upon demand telephone service of any of the classes or kinds mentioned in this section, in the City of Chicago, without discrimination, at the same rates, to all persons, firms and corporations who shall elect to take or use any of such classes or kinds of service * * *.”

And the same language is used in Section 2 of the ordinance passed May 26, 1913. Thus from the above it can be seen that it was the intention of the framers of the Telephone Ordinances to give uniform service and rates without discrim-

ination to all subscribers in the City of Chicago during the term of the grant. Those portions of the ordinance which refer to neighborhood service and neighborhood boundaries are paragraph 3 of Section 5 of the ordinance of November 6, 1907, which is as follows:

“The said Chicago Telephone Company shall under the supervision of the commissioner of public works, from time to time, lay out, locate, build, construct, equip, maintain and operate extensions of and additions to its system of wires, cables, electrical conductors, poles and conduits, and new exchanges in any part or parts of the City of Chicago for the purpose of supplying all or any of the kinds of service which it is authorized to furnish under this ordinance, whenever in the judgment of the City Council it is necessary *in order to meet any considerable demand* of the public, or a portion thereof, for such kinds of service, or any of them, and whenever said City Council shall so require by ordinance or resolution passed not less than thirty (30) days after a request by said City Council, or some officer of the city designated by it, upon said Chicago Telephone Company, to do said work.”

and sub-section (h) of Section 2 of the ordinance of May 26, 1913, which provides as follows:

“(h) Neighborhood Exchange Service.

“In addition to its telephone system extending throughout the city limits, said Chicago Telephone Company may maintain and establish local or neighborhood exchanges within its limits. * * * and said Chicago Telephone Company, during the period of the grant made in said ordinance of November 6, 1907, shall establish and maintain a local and neighborhood exchange in any suburban district within the city limits, if said district is north of Devon avenue, west of Fortieth avenue or south of 71st street, whenever the City Council shall by ordinance or resolution so direct, but said City Council shall not so direct *unless there is reasonable demand* therefor in such district and unless it or some officer of the city designated by it, shall have made a request upon said Chicago Telephone Company to establish or maintain such local or neighborhood exchange at least thirty days prior to the passage of such ordinance or resolution.”

The language used in the above is plain and readily understood. From your communication it is evident that the party making complaint lives outside of an established neighborhood exchange and that there has not been any great demand upon the telephone company for service in his immediate vicinity. The ordinances provide for the supplying of telephone service when "necessary in order to meet any considerable demand," and specify a means of enforcing such service. While a public service corporation cannot act arbitrarily or discriminate among its customers, where similarly situated, by favoring one customer of a class or one class over others, a distinction may be made between different customers or classes of customers on account of location, amount of consumption or other material conditions which distinguish them from each other or from other classes.

It would be unreasonable to expect the telephone company to extend its lines and equipment from time to time to meet the convenience of a lone subscriber in an out of the way place or away from the thickly populated sections of the city, and the fact of *refusal to supply* such service when requested by any number, deemed by the company and the City Council to be less than a "considerable" or "reasonable" number, would not be discriminatory. What is a "considerable" or "reasonable" number would in the final analysis be for the City Council to determine in view of all the facts and circumstances in the particular case before them.

From the foregoing, I am of the opinion that the party making complaint is not being discriminated against unless he can show that there is a considerable demand in his particular vicinity by persons seeking telephone service.

Yours very truly,

DANIEL A. ROBERTS,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTTELSON,
Corporation Counsel.

Interpretation of Act Providing for Licensing of Structural Engineers.

January 26, 1916.

HON. CHARLES BOSTROM, Commissioner of Buildings.

Dear Sir:

Replying to your letter of the 31st ult., in which you ask this department to construe an act of the Legislature providing for the licensing of structural engineers, approved July 5, 1915, I have divided your queries, as follows:

(1) Does the construction of an addition to a bakery establishment, two stories and basement in height, to be fireproof, of reinforced concrete, complying with all requirements of the ordinances of the city, come within Section 12 of the act above referred to, and is the Building Department of Chicago required to approve plans of such addition submitted by a licensed structural engineer?

(2) Does Section 14 of said act authorize the building commissioner to issue permits without amendment being made to the present Section 231 of the Chicago Code of 1911, which requires that all plans shall be signed and sealed by a licensed architect?

(3) Construing the language of Section 12 of said act, "structures, other than buildings."

This, as I understand it, is the first time, under the act referred to, that any structural engineer has applied for the approval of plans, and you are desirous of getting a construction upon Section 12 of the act of July 5, 1915, for the purpose of establishing a precedent and a rule to go by.

That part of Section 12 of the act referred to reads, as follows:

"Any person who shall be engaged in the designing or supervising of the construction, enlargement or alteration of any *structures, other than buildings*, as hereinafter defined, or any part thereof for others, and to be constructed by persons other than himself, shall be regarded as practicing structural engineering within the meaning of this act, and shall be held to comply with the same. *Structures within the meaning of this act shall be*

*construed to mean all structures other than buildings, having as essential features, foundations, columns, girders, trusses, arches and beams, with or without other parts, and in which safe design and construction requires that loads and stresses must be computed and the size and strength of parts must be determined by mathematical calculations based upon scientific principles and engineering data * * *."*

The test lies in that part of Section 12 italicized. It is apparent that one following this profession must be a person of technical training, skilled in designing for safety and a judge of construction requiring loads and stresses, which must be properly computed and all calculations based on scientific principles and engineering data.

That part of Section 12, following the part already quoted, reads as follows:

" * * and any person who shall be engaged as a principal in the designing and supervision of the construction of structures or the structural parts of structures designed solely for the generation of electricity, or for the hoisting, cleaning, sizing, or storing of coal, * * * shall be considered as structural engineers within the meaning of this act, and shall be entitled to the benefits of those provisions, even though such structures may come under the definition of 'buildings' as defined in 'An Act to provide for the licensing of architects * * *.'"*

You will observe that the first part of Section 12 applies to all persons engaged for others and the construction to be by persons other than "himself," while the last part of the section applies only to *principals* who do the constructing themselves and it points out specifically the structures a *principal* is permitted to build. While they are both structural engineers under the act, it seems as though a principal would be confined to the specific structures named, while one engaged for others and where persons other than "himself" do the constructing has an unlimited field, so long as the work has the "essential features" referred to in the definition.

You speak of a conflict in the use of the words, "struc-

tures, other than buildings, as hereinafter defined," in the first part of the section and the words, "even though such structures may come under the definition of 'buildings,' as defined in 'An Act * * *,'" "

The definition of "structures, other than buildings," is set out in that part of the section which reads:

"Structures within the meaning of this act shall be construed to mean all structures other than buildings, having as essential features, foundations, columns, girders, trusses, arches and beams, with or without other parts, and in which safe design and construction requires that loads and stresses must be computed and the size and strength of parts must be determined by mathematical calculations based upon scientific principles and engineering data, * * *"

Any building that has not the essentials pointed out in the act would be the exception, "other than buildings."

As to whether plans submitted by a structural engineer are plans for a "structure, other than buildings," as defined, is for the building commissioner to say, and in judging that you must refer to that part of the section referring to "essential features." If there is any doubt in your mind and you refuse to act, the party aggrieved no doubt will file a petition for mandamus, and the court would construe the language as to the particular case, and until the matter is brought before the Supreme Court you will have to use your best judgment.

Section 14 clearly gives you the right to issue permits to "any owner, or his agent," upon compliance by the applicant with that part of the section.

I am, therefore, of the opinion:

(1) That if the plans prepared by Mr. Heinrich Heine contain the "essential features" referred to in the act, he is entitled to have same approved.

(2) That the statute makes it mandatory upon you to issue the permit and it is not necessary to amend Section 231 of The Chicago Code of 1911, which requires that plans shall be signed and sealed by a licensed architect. Section 9 of said act exempts structural engineers from the provisions licensing architects, and Section 14 of said act provides that

the structural engineers certify to the plans, drawings and specifications under their seals.

(3) That "structures, other than buildings," referred to in Section 12, are such buildings as the building commissioner determines have the "essential features" defined therein.

Yours very truly,

ANTON T. ZEMAN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Rights of City in Certain Alley.

January 26, 1916.

HON. JAMES A. KEARNS, Chairman, Committee on Compensation.

Dear Sir:

We are in receipt of yours of January 5th, asking advice as to the legal rights of the City of Chicago to vacate the south two and one-half feet of the east and west sixteen foot alley in the block bounded by Broadway, Glenlake avenue, Glenwood avenue and Hood avenue, and in reply desire to state that this matter was before this department under the former administration and an opinion was rendered to the Honorable L. E. McGann on November 14, 1912, and to the Honorable George F. Harding, Chairman of Committee on Compensation on May 22, 1913, a copy of said opinions being herewith enclosed.

On investigation we find that the property owners in Block One for the past twenty or twenty-five years have had possession of said lots to the extent of the depth indicated on the plat, and have purchased their property in many instances upon surveys made by their own surveyors, which survey has given them the depth of property as indicated on the plat submitted to us. Fences have been constructed,

and in one instance we are informed, a two-story stucco building was constructed on the alley line indicated as to the depth of house on plat, and they have so remained for the past twenty or twenty-five years, and the alley, during that period of time, has never been recognized as more than about fourteen feet.

Several surveys have been made, and from what we are informed, the error seems to be north of the alley in question. The Council, then having all of this information at hand, did, on June 23, 1913, page 1087, pass an ordinance vacating the south two and one-half feet of the east and west sixteen feet of the public alley, north of and adjoining the north line of the lots therein described, and being on the alley in question.

Through the neglect of the property owners, and more particularly Henry Krauter mentioned in the ordinance, the ordinance and the plat were never recorded, and consequently did not go into effect. In the fall of 1913, the property owners of lots 47, 48 and 49, in said block, based upon the passage of said ordinance and contending, by their own survey, that the lots were 124.65 feet in length as indicated on plat, constructed a three-story flat building on the same. We are informed that all the property owners adjoining both sides of said alley are satisfied with same at a width as it now is, about fourteen feet, and are willing that the city should vacate the two and one-half feet so as to make a uniform width.

Since the city has apparently acquiesced in the vacation of this portion of the alley for the past twenty or twenty-five years, by allowing fences and said building on the line, in accordance with the depth of the lots indicated on the plat, and since the passage of the ordinance in 1913 has allowed the construction of a three-story flat building, we believe the doctrine of equitable estoppel would apply in any action brought by the city. Then again, taking into consideration the conflicting surveys and the property owners contending that they have only occupied, according to their own survey, what legally belongs to them, while the statute of limitations does not run against the city, we doubt very

much whether the city could successfully maintain an action of ejectment.

We are therefore of the opinion that the Council would be justified in passing said ordinance, which would definitely fix the line of said alley, and we believe that the compensation feature should be omitted.

Very truly yours,

BENTON F. KLEEMAN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Appropriation for Committee on Railway Terminals.

January 27, 1916.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

Replying to your letter of the 27th instant, in which you ask that your committee be furnished with an opinion as to the legality of an appropriation for the Committee on Railway Terminals, as set forth on page 13 of the Comptroller's and Departmental Estimates for the Year 1916, we beg to say that the life of the Railway Terminal Commission, for which an appropriation of \$36,000 as one of the expenses of this committee is asked, will expire at the end of the council year 1915-16. This is in accordance with the resolution adopted at the meeting of the City Council held on May 24th, 1915, as follows:

“WHEREAS, The City Council on May 25, 1914, (pages 506 and 507 of the Journal of the Proceedings of the City Council of said date) adopted a resolution constituting a Railway Terminal Commission consisting of seven members; and

“WHEREAS, Said resolution provided that the terms of office of the members of said Commission should expire April 1, 1915; and

“WHEREAS, The Committee on Railway Terminals of the City Council found it advisable and necessary to employ and did employ the services of said commission beyond April 1, 1915, and the continuous existence of said commission is deemed necessary and advisable; therefore, be it

“RESOLVED, That the life of said Railway Terminal Commission be and the same is hereby continued for the Council year 1915-16 in accordance with the terms of said resolution of May 25, 1914.”

At the same meeting an order of the Council was passed as follows:

“ORDERED, That the compensation of John F. Wallace, chairman of the Railway Terminal Commission, at the rate heretofore fixed by agreement with the Committee on Railway Terminals, be and the same is hereby authorized to be paid for the month of April, 1915, and succeeding months, in accordance with such agreement or extension of same between said John F. Wallace and the Committee on Railway Terminals, and the city treasurer and the city comptroller are hereby ordered to pay such compensation from appropriations for the Committee on Railway Terminals.”

From this it appears that the life of the Railway Terminal Commission will expire with the end of the current Council year and of course appropriations for the allowance to Mr. Wallace, extending beyond that period, will not be authorized. On the 18th instant we wrote the city comptroller as follows in reference to this matter:

“In respect to monthly allowances to John F. Wallace, Chairman of the Chicago Railway Terminal Commission, as per agreement with the Committee on Railway Terminals, we beg to advise you that by the resolution of the City Council adopted May 25, 1914, this appears to be an expenditure for securing reports, etc., to the City Council upon the passenger and freight railway terminal situation and problems, present and future in the City of Chicago. The agreement for such expenditures was expressly ratified and authorized by an order of the City Council on May 24, 1915. We understand that the reports, etc., for which the expenditures in question are made and to be made, are now

and will be in the future the property of the City of Chicago, and see no objection to the payment of the compensation directed by the ratification order of May 24, 1915, for the purpose indicated above, from any proper appropriation therefor."

As indicated above, the expenditures of the Committee on Railway Terminals for the expenses of the Railway Terminals Commission for the purposes for which it was organized, are lawful when properly authorized and proper contracts entered into for such expenditures. If it is the desire of the City Council to have the work of this commission continue after the current council year, an appropriate ordinance should be prepared and passed authorizing the same.

Very truly yours,
 GEORGE E. CHIPMAN,
Acting Corporation Counsel.

Clearance Between Public Utility Wires and City Property.

January 27, 1916.

HON. WM. G. KEITH, Commissioner of Gas and Electricity,
 Chicago, Illinois.

Dear Sir:

Your communication of January 24th last relative to clearance between public utility wires and property of the City of Chicago, requesting an opinion as to whether the expense of moving, raising or re-routing the public utility property should be borne by the public utility or the City of Chicago, has been referred to me.

In reply thereto we beg to state that while municipalities may by ordinance grant to individuals and corporations the privilege of occupying the streets and public ways for lawful purposes, such as railroad tracks, poles, wires, gas and water pipes, such rights are at all times held in subordination to the superior rights of the public, and all necessary and desirable police ordinances, that are reasonable, may be enacted and enforced to protect the public

health, safety and convenience notwithstanding the same may interfere with prior franchise rights of the public utility.

In the case of *National Water Works Co. v. City of Kansas*, 28 Federal Rep., p. 921, the opinion of the court is thus summarized in the syllabus:

“A water company laying its pipes in the streets of a city, under a contract with the city, does so subject to the right of the city to construct sewers in said streets whenever and wherever the public interest demands, and if, in consequence of the exercise of this right, the company is compelled to relay its pipes, it can maintain no claim therefor against the city, unless the action of the city is unreasonable or malicious.”

The above doctrine has been approved by text-writers and is stated in McQuillan on Municipal Corporations at page 816.

In the case of *Western Union Telegraph Company v. Electric Light and Power Company*, 70 N. E. 866, the court stated:

“The public utility companies may be required to bear the expense of such re-location if the space now used by such companies is required for use by the city for public purposes. * * *”

In 2nd Dillon on Mun. Corp., Sec. 987, the text-writer says:

“A telephone company placing its conduits, poles and wires in the streets under a franchise contract with the city does so in subordination to the superior rights of the public through its duly constituted municipal authorities to construct public improvements in the same streets whenever and wherever the public interest demands, and if in consequence of the exercise of this right the telephone company is compelled to relay its conduits and wires and *reset* its poles, in the absence of unreasonable or malicious conduct on the part of the municipality it has no cause of action against it (the municipality) for reimbursement on account thereof.”

On the authority of the above, I am, therefore, of the opinion that the cost for moving, raising or re-routing

the public utility property should be borne by said public utility and not by the City of Chicago.

Yours very truly,

DANIEL A. ROBERTS,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTTELSON,

Corporation Counsel.

Submission of Park Consolidation Act.

January 29, 1916.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

Your communication of January 22, 1916, in re submission of Park Consolidation Act, addressed to the corporation counsel and requesting a draft of ordinance or ordinances necessary to be passed to place this question on the ballot leaving the dates blank, also information as to the dates same must be passed to have the question placed on the ballot at any one of the elections to be held in 1916, has been referred to the undersigned for reply.

Complying with your request, we have drafted a form of ordinance with the date of election left blank.

Section 34 of Article IV of the Constitution of 1870, which is the section under which this act was passed, provides:

“No law based upon this amendment to the constitution, affecting the municipal government of the City of Chicago, shall take effect until such law shall be consented to by a majority of the legal voters of such city voting on the question at any election, general, municipal or special; and no local or special law based upon this amendment affecting specially any part of the City of Chicago shall take effect until consented to by a majority of the legal voters of such part of said city voting on the question at any election, general, municipal or special,”

Section 1 of Article VIII of the act provides:

“Before the foregoing provisions shall be in force and effect, this act shall be submitted for adoption, respectively, to the legal voters of the City of Chicago and the legal voters of the several towns or townships, parks or park districts, or other local governments and authorities hereby sought to be consolidated.

“The City Council of the City of Chicago may by ordinance direct that the question of the adoption of this act shall be submitted to such legal voters at any general, municipal or special election in and for the entire city to be held not less than thirty days from and after the passage of such ordinance. The city clerk of the City of Chicago shall promptly certify the passage of such ordinance to the Board of Election Commissioners and it shall thereupon be the duty of such Board of Election Commissioners to submit the question of the adoption of this act to such legal voters. * * *

From the foregoing it will be seen that the act follows the language of the Constitution in that it must be submitted at a general, municipal or special election. Three elections are to be held in 1916, to wit, on April 4, 1916, June 5, 1916 and November 7, 1916. We wish first to consider how the terms general, municipal and special elections apply to the elections to be held on said dates. The elections held in cities each year on the first Tuesday of April, which in 1916 is April 4, are held for the purpose of electing city officials. They are sometimes referred to as city elections and sometimes as municipal elections.

The Supreme Court in construing the word “municipal” in connection with the term Municipal Court of the City of Chicago in *Miller v. The People*, 230 Ill. 65, at page 74 says:

“The word ‘municipal’ is defined by all authorities as meaning of or pertaining to a city or corporation having the right to administer local government.”

There can be no contention but that the election to be held on April 4, 1916, is a municipal election.

Next, what elections are general elections? In Article VI of the Constitution of 1848 upon elections and the rights of suffrage, Section 9 provides:

“The general elections shall be held on the Tuesday next after the first Monday of November, biennially, until otherwise provided by law.”

This Constitution went into force April 1, 1848.

In *Town of Ottawa v. The County of La Salle*, 11 Ill. 654, decided in 1850, the court says:

“The first general election held under the new Constitution, was in November, 1848,”

and commenting upon the Ninth Section of the Sixth Article further says:

“The Legislature has not attempted to change the times of the elections, but, by an irresistible implication, they have changed the general elections from biennial to annual, so that all of the regular November elections are considered general elections.”

The question there under consideration by the court was the adoption of the Township Organization Act, which the court said “could only be done at the general election,” and still further:

“We hold, then, that the Legislature has in the exercise of the authority conferred by the Constitution, provided for annual general elections; and that as the law now stands, at least for all the purposes of this act, the annual November elections are general elections.”

And again, passing upon the adoption of the township organization, in *People v. Garner*, 47 Ill. 246, decided in 1868, the court held that elections in November of 1859 and November of 1865 were general elections.

Coming next to the consideration of the Constitution of 1870, we find that Article VIII on suffrage does not contain the provision upon the subject of general elections found in Section 9 of Article VI of the Constitution of 1848. We do, however, find that Section 2 of Article IV provides for an election of members of the General Assembly to be held on the first Tuesday next after the first Monday of November, 1870, and every two years thereafter, and that Section 3 of Article V provides for the election of governor and other state officers on the Tuesday next after

the first Monday of November, 1872, and every four years thereafter, for superintendent of public instruction on Tuesday next after the first Monday of November, 1870, and every four years thereafter, and for treasurer on the day last above mentioned and every two years thereafter.

Section 14 of Article VI, judicial department, provides:

“The General Assembly shall provide for the times of holding court in each county, which shall not be changed, except by the General Assembly next preceding the general election for judges of said courts; but additional terms may be provided for in any county. The election for judges of the Circuit Courts shall be held on the first Monday in June, in the year of our Lord 1873, and every six years thereafter.”

Section 23 of Article VI in part provides:

“The Superior Court of Chicago shall be continued and called the Superior Court of Cook County. The General Assembly may increase the number of said judges, by adding one to either of said courts for every additional 50,000 inhabitants in said county, over and above a population of 400,000. The terms of office of the judges of said courts hereafter elected shall be six years.”

Section 5 of Article X provides:

“The General Assembly shall provide, by general law, for township organization, under which any county may organize whenever a majority of the legal voters of such county, voting at any general election, shall so determine. * * * And in any county that shall have adopted a township organization, the question of continuing the same may be submitted to a vote of the electors of such county, at a general election, in the manner that now is or may be provided by law; * * *”

We have found no case construing the foregoing provision with reference to what general election is intended.

Section 8 of Article X provides:

“In each county there shall be elected the following county officers, at the general election to be held on the Tuesday after the first Monday in November, A. D. 1882: a county judge, county clerk, sheriff and treasurer, and at the election to be held on the Tuesday after the first Monday in November, A. D. 1884, a

coroner and clerk of the Circuit Court (who may be *ex officio* recorder of deeds, except in counties having 60,000 and more inhabitants, in which counties a recorder of deeds shall be elected at the general election in 1884). * * *

This section came into the Constitution by way of an amendment adopted by the people at the general election held November 2, 1880. The Supreme Court construed the section in *People v. Board of Supervisors*, 100 Ill. 495, and at pages 501 and 502 said:

“The 8th section of Article 10, when adopted in 1870, in its connection with the other clauses of the Constitution and the statutes then in force, continued in lawful existence the offices of county judge, county clerk and county treasurer, to hold such terms and be elected at such times that it required an election to be held for each of these offices in November, 1881. Thus stood the law when the General Assembly submitted this amendment, and when it was adopted by the people. Part of this law consisted of statutes passed before the Constitution of 1870 was adopted, and so much thereof as was necessary for the election of officers who should, under the Constitution, enter upon their duties on the first Monday of December, 1881, had been by the Constitution placed beyond the power of the Legislature to destroy by repeal, and was in its very essence to that extent a part of the constitutional law of the land, although in the form of a statute, providing for a *general election* for county officers in November, 1881, and every two or four years after. * * * The effect of the adoption was to supersede the previous provisions for a general election for these officers, which was for an election in November, 1881, and thereby to extend the time wherein the then incumbents should have the right to hold their offices until the first Monday of December, 1882. If this be so, it ends controversy upon this subject.”

Section 5 of Article XI in part provides:

“No act of the General Assembly authorizing or creating corporations or associations with banking powers, whether of issue, deposit or discount, nor amendments thereto, shall go into effect or in any manner be in force unless the same shall be submitted to a vote of the people at the general election next succeeding the

passage of the same and be approved by a majority of all votes cast at such election for or against such law."

We also find that Section 1 of Article XIV of the Constitution of 1870 in reference to amendments provides that:

"Whenever two-thirds of the members of each house of the General Assembly shall, by a vote entered upon the journals thereof concur that a convention is necessary to revise, alter or amend the Constitution, the question shall be submitted to the electors *at the next general election.*"

Now, since the Constitution of 1870 is silent, so far as express terms are concerned, which elections are general elections (except the general election for Circuit judges referred to in Section 14 of Article VI and the general elections for county officers in 1882 and 1884 and the recurring periods thereafter referred to in Section 8 of Article X), how are we to determine what general elections are referred to in Section 5 of Article X, in Section 5 of Article XI and in Section 1 of Article XIV? It should be borne in mind, however, that at the time Section 1 of Article XIV of the Constitution of 1870 was drafted by the constitutional convention and adopted by the people of the state, Section 9 of Article VI of the Constitution of 1848 expressly made the biennial November election held during the even numbered years general elections and that the statutes passed in pursuance of said Section 9 either expressly or by necessary implication (*People v. Garner, supra*) made the November elections held in the odd numbered years general elections. These facts were certainly in contemplation of the members of the constitutional convention of 1870 and of the people of the state when said Constitution was adopted and we have no doubt that the general elections referred to are those provided for on the first Tuesday after the first Monday in November in the even numbered years or those at which members of the General Assembly and general state officers are elected, and further those general elections held in the odd numbered years which were made general elections by reason of statute passed in pursuance

of Section 9 of Article VI of the Constitution of 1848. This view is borne out by the holding in *People v. Supervisors*, 100 Ill. 495, at page 502 as above quoted, and further by the fact that all questions of submitting amendments to the Constitution of 1870 have been submitted at the November general elections. The fact, however, remains that the election of the judges of the Circuit Court in June is by the Constitution referred to as a general election and since the judges of the Superior Court (who are the only officers to be elected on June 5, 1916) have the same jurisdiction as judges of the Circuit Court, it may reasonably be inferred that the election of these judges even from a constitutional point of view would be considered a general election.

The decision in *People v. Pressler*, 168 Ill. App. 291, supports this view. This was a case in which Pressler kept open a saloon for the sale of intoxicating liquors within one mile of a polling place at which an election for trustee of schools was being held in a certain township in Lee County in violation, as it was alleged, of Section 79, Chapter 46, Revised Statutes, which forbids that any saloon or place where liquor is sold or given away be open upon any general or special election day within one mile of the place of holding an election. In deciding the case, the court said:

“A general election is one provided for by law throughout the state or certain subdivisions. A special election is one provided for by law under special circumstances.”

It was further observed that the election held for the purpose of electing a trustee of schools is provided for generally throughout the state. We have conferred with Colin C. H. Fyffe, Esq., attorney for the Board of Election Commissioners, in this matter, and he is of the opinion that the election of June 5, 1916, is a general election, relying upon the holding in the Pressler case. This may, however, be open to doubt.

It certainly cannot be contended that the judicial election in June is a special election. Special elections, as set forth in the Pressler case, are provided for by law under

special circumstances and they can only be held when authorized by some official or authority duly vested with power for that purpose. A special election may be authorized for a certain day fixed by the Legislature itself as was the case when the proposed charter of 1907 was submitted to the people of the City of Chicago on September 17, 1907. A special election may also be called by the governor of the state for the purpose of filling a vacancy in a state office, or by other properly constituted authority as the City Council or the Board of Trustees of a village. Section 14 of Article IV of the Cities and Villages Act provides as follows:

“Section 14. If there be a failure to elect any officer herein required to be elected, or the person elected, should fail to qualify, the City Council or Board of Trustees may forthwith order a new election therefor; and in all cases, when necessary for the purpose of this act, may call special elections, appoint judges and clerks thereof, canvass the returns thereof, and provide by ordinance for the mode of conducting the same; and shall give notice of such special elections, in which shall be stated the questions to be voted upon, and cause such notices to be published or posted for the same length of time and in the same manner as is required in the case of regular annual elections in such cities or villages.”

It is here pertinent to consider, if there should be any doubt that the judicial election to be held June 5, 1916, is a general election, whether or not the City Council might not call a special election upon the same day for the submission of the Park Consolidation Act. We have carefully considered this question and have come to the conclusion that such a course would be open to grave doubt and uncertainty. In the first place, Section 14 of Article IV of the Cities and Villages Act, above quoted, provides that special elections may be called “when necessary for the purposes of this act.” Is the submission of the Park Consolidation Act one of the purposes of the Cities and Villages Act? We are of the opinion that it might be urged with considerable show of force that it is not, for the purposes

of the Cities and Villages Act are to carry out its own provisions while the purpose of the submission of the Park Consolidation Act is to a very large extent to supersede the Cities and Villages Act. But, even if said Section 14 is broad enough to authorize the calling of a special election for the submission of the Park Consolidation Act, a more serious question arises in connection with calling special elections in the several towns or townships, parks or park districts, or other local governments or authorities sought to be consolidated.

It is to be noted that Section 1 of Article VIII of the Park Consolidation Act authorizes the City Council of Chicago to submit the question of the adoption of the act by the passage of an ordinance as therein provided for, and here we may say that we deem that the General Assembly has full power to delegate to the City Council the question of the submission of this act not only so far as the city itself is concerned but also so far as the said several towns or townships, parks or park districts, or other local governments or authorities sought to be consolidated are concerned, but the act does not confer any power upon the City Council of Chicago to call special elections in and for such towns or townships, parks or park districts, or other local governments or authorities and neither do any of the laws providing for the creation and administration of parks and park districts, which are the principal bodies to be consolidated, so far as we are able to ascertain make provision for the calling of special elections even if their governing bodies were inclined so to act.

For the foregoing reasons, we do not deem it advisable or proper here to enter into a discussion of the various steps and provisions necessary for the holding of a special election. We have also considered a number of the general election laws of the state in our attempt to determine what is a general election and whether the election to be held on June 5 is such an election. The terms "national," "state," "county," "general," "special," "local" and "municipal" are variously used either alone or in combination throughout the numerous statutes. This is confusing and renders the determination more or less uncertain.

Section 127 of the "Act in regard to elections and to provide for filling vacancies," approved April 3, 1872, refers to "a general election for members of the Legislature," while Section 129, which provides for filling vacancies in the General Assembly, refers to "the next succeeding general election." Whether the General Assembly in passing this act intends to refer to the November elections, at which only its members may be elected, as the only general elections or merely as general elections at which its members are elected is not made clear.

Section 2 of the act to provide for the printing and distribution of ballots at public expense of June 22, 1891, in part provides:

"The term 'general election' *as used in this act*, shall apply to any election held for the choice of a national, state, judicial, district or county officer whether for the full term or for the filling of a vacancy. The term 'city election' shall apply to any municipal election held in a city, village or incorporated town."

It is to be noted that the foregoing does not purport to contain definitions of general election and city election, but merely says that as used in that act those terms shall apply respectively to the election of national, state, judicial, district or county officers, or to elections held in cities, villages or incorporated towns, and the intent of the Legislature, it would seem, is only to apply to the various elections enumerated merely for the purpose of the printing and distribution of ballots at public expense. The language quoted does not in itself purport to be a definition of general application but rather only of special application for the purposes of the act in question. For this reason, we do not believe that the General Assembly when it passed Section 34 of Article IV of the present Constitution in 1903, nor the people of the state when they voted upon this section in 1904, could by any reasonable rule of statutory construction be held to have adopted the above language pertaining to "general election" quoted from Section 2 of the Ballot Law of June 22, 1891, as a general definition for "general election."

Many other sections or portions of the numerous laws of the state might be quoted and commented upon but we doubt whether such continued consideration would throw light upon or materially assist in clearing up doubts and uncertainties as to just what elections are general elections within the meaning of that term as used in Section 34 of Article IV, and accordingly we bring that part of this discussion here to a close.

As to what time the ordinance for submission should be passed in order to have the question legally placed upon the ballot, Section 1 of Article VIII of said act provides that the question of the adoption of the act shall be submitted to the "legal voters at any general, municipal or special election in and for the entire city to be held not less than thirty days from and after the passage of such ordinance." In order to avoid all questions of doubt and points for legal attack in this particular, we are of the opinion that such ordinance should be passed in such due and ample time so that in case His Honor, The Mayor, does not sign the same and shall fail to return the ordinance with objections thereto, to the City Council at the next regular meeting of the same occurring not less than five days after the passage of the ordinance, the same would take effect and be in force at least thirty days prior to such election. (See Section 18, Article III of Cities and Villages Act of April 10, 1872.)

Our conclusions are as follows:

First. That the Park Consolidation Act may be legally submitted on April 4, 1916, for the reason that the election to be held on said date is a municipal election within the meaning of Section 34 of Article IV of the Constitution.

Second. That said Park Consolidation Act may be legally submitted at the election to be held on November 7, 1916, since we believe there can be no question but that the election to be held on that date is a general election within the meaning of said Section 34 of Article IV.

Third. That the election to be held on June 5, 1916, at which the only officers to be elected are judges of the Superior Court of Cook County, is a general election, but that

the question of its being a general election is not entirely free from legal doubt and that if said Park Consolidation Act should be submitted at such an election such submission might be open to attack in the respect indicated.

Fourth. That it is doubtful whether the City Council of the City of Chicago has power to call a special election for the submission of this act; that it is still more doubtful whether any competent authority is clothed with power to call special elections for the submission of this act in the various parks and park districts sought to be consolidated.

Fifth. That the only special election at which said act might be legally submitted would be a special election authorized and designated by the General Assembly itself, which has not thus far been done, or one authorized and designated by some officer or authority qualified with power so to act, which provision has thus far not been made.

Sixth. That the ordinance submitting said Park Consolidation Act to the legal voters should be passed at such time that it would take effect and be in force at least thirty days prior to the election at which it is submitted.

Respectfully submitted,

JAMES G. SKINNER,

JOHN A. COOKE,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTTELSON,

Corporation Counsel.

Appropriation for Civic Music Association.

February 2, 1916.

HON. ELLIS GEIGER, Alderman, 21st Ward.

Dear Sir:

Your request of January 29, 1916, addressed to the corporation counsel, for advice as to whether the city has the legal right to make an appropriation of One Thousand Dollars asked by the Civic Music Association and to be used

by said association for free concerts in schools and social centers, as set forth in the printed Journal of the Proceedings of the City Council of January 19, 1916, at page 2935, has been referred to the undersigned for reply.

Section 1 of Article V of the Cities and Villages Act of April 10, 1872, among other things, provides that the City Council shall have power "to appropriate money for corporate purposes only." This section further sets forth the general corporate powers of the City Council. I have carefully examined these provisions and have made a careful search of the other statutes which confer power upon cities, and from such examination and search I find no enumeration of power conferred, either expressly or by necessary and indispensable implication, upon cities to appropriate municipal funds for the purpose indicated in your communication. I am therefore of the opinion that the object set forth in said communication is not a corporate purpose and that the City Council has no power to appropriate municipal funds therefor.

Respectfully submitted,

JAMES G. SKINNER,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Franklin-Orleans Street Bridge.

February 2, 1916.

HON. JOHN KJELLANDER, Chairman, sub-Committee on Streets and Alleys, Chicago, Illinois.

Dear Sir:

As stated to you, the representative of the Chicago & Northwestern Railway Company presented a tracing of which blue prints were to be made for the purpose of attaching one as Exhibit "B" to the Franklin-Orleans Street Bridge Ordinance and said tracing did not contain the name

of North Water street so as to indicate what street is known by that name and did not contain lines indicating the width of said street between North Dearborn street and North State street.

By reason of this omission the bridge engineers, after a consultation with the writer, declined to approve the plat. Thereupon Mr. Wheeler of the Railway Company was notified, and after some discussion over the telephone he agreed that the name of the street should go into the plat. When the same was turned over to him, however, he stated that he did not understand that we also insisted on the lines showing the street between Dearborn street and State street going into the tracing. He declared that there was no North Water street between Dearborn and State streets.

We examined the plats in the Map Department and found that the street was platted there as well as west of Dearborn street. We found also a note on the plats indicating that this street, known as the new North Water street, was opened by condemnation in 1849 but that the documents had been burned. We are, therefore, unable to point to the original documents showing that there was actually a condemnation which opened up this street at the place in question. We are informed, however, that there is a plat showing the street made in 1852 in the possession of the Chicago Historical Society. We have not examined same and do not think it is necessary for the purposes of this ordinance, because the Chicago & Northwestern Railway Company, from our point of view, has no right to claim that the street was not opened or that there was any irregularity about the opening of same, since its predecessor, the Galena & Chicago Union Railroad Company, by accepting an ordinance and entering into a contract with the city, expressly recognized the existence of the street at that point. The said ordinance and contract appear in "Special Ordinances of Chicago" at pp. 706-710, inclusive.

Mr. Wheeler accompanied the writer to the street and we there found that the public appears to be making some use of same between Clark and La Salle streets, that the street is in a very much cut-up condition between Clark

and Dearborn streets and that between State and Dearborn streets there is a vitrified brick raised pavement which it is claimed is a private team track constructed by the railroad company. It would seem that the public has at least as much chance to use the street between State and Dearborn streets as between Dearborn and Clark streets, even though the roadway may have been paved at the expense of the railroad company.

Mr. Wheeler at first claimed that the condemnation proceedings had failed and offered to show us what they have on this subject. An examination of the plat in the possession of the general counsel, however, disclosed nothing new and could not be looked to as any authority in the matter because it was drafted simply for the convenience of the law department of the railroad company. Both the general counsel and Mr. Wheeler admitted this after we made an examination of this plat. They had some memorandum to the effect that the condemnation proceedings had failed and that there had been no use made of the street by the public, but it is only a memorandum and is not backed by any authority which we regard as a confirmation of same. Their attention was called to the ordinance and contract and they looked up the original contract and examined same and found that it is printed correctly in the book to which we refer above.

The upshot of the discussion was that we declined to accept any plat which did not show the street, and they, on their part, said they did not wish to raise a controversy over this matter in connection with this ordinance and would prefer to have Section 15 amended so as to confirm their rights in North Water street between the east line of North Dearborn street and the west line of Wells street, instead of as it appears, the wording now being such that it would confirm the rights of the company from the west line of North State street to the west line of Wells street. In this way the matter could be left open for a settlement on its merits if it should become necessary at any time in the future to assert the rights of the city. They say if this is satisfactory they will submit a new plat showing the tracks only as far east as the east side of Dearborn street.

We have no recommendation to make with regard to this proposal on their part. When the matter first came up it was our understanding that the railroad company desired to have its rights settled so far as the block in question is concerned as well as in the street west of that point. But if that is not desired and there is no immediate need of settling the status of the street between State and Dearborn streets, this alteration would not interfere with the rights of the city if they were asserted in the future. The plat in question as proposed would undoubtedly be looked upon as authority for the tracks which spread out in North Dearborn street and occupy a somewhat wider area than is included within the boundaries of North Water street.

We would like to get an expression from your committee as to whether the proposal should be accepted. Please advise us at your earliest convenience.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTTELSON,

Corporation Counsel.

Lawfulness of Picketing.

February 2, 1916.

HON. THOMAS J. LYNCH, Chairman, Committee on Schools,
Fire, Police and Civil Service.

Dear Sir:

I am in receipt of a communication from Honorable John Siman, city clerk, dated January 22, 1916, in which he states that your committee is desirous of having this department render an opinion as to whether or not the law permits "peaceful picketing."

The term, "peaceful picketing," while one which has been given some degree of prominence in discussions involving labor questions, nevertheless does not define a form of

picketing which the law will in every case either condemn or protect. There are many forms of picketing which may be peaceable in the sense that they contemplate no physical violence and yet which are regarded as unlawful by the courts. Any consideration, therefore, as to whether "peaceful picketing" is or is not unlawful will necessitate a reference to the circumstances which may exist in the particular case, for example, the purpose for which the picket line is maintained and the means by which the pickets seek to attain their object.

It is well established that any conduct on the part of pickets or patrols which is calculated to result in intimidation or coercion will not be countenanced by the law. Abuse, threats or violence are alike unlawful, when they are intended to interfere with the right of a laborer to select his employer and continue his work without molestation and the right of the employer to employ persons who are willing to work for him and to carry on his business without suffering the injury which may result from such measures. There is no doubt as to the right of employes, if they are under no contract obligation to continue their work, to leave their employment, either singly or in a body, for a justifiable reason or for no reason at all. The law will, however, endeavor to protect by injunction the right of an employer to secure other employes and the right of workmen to accept employment by him without the obstacle of coercive and intimidating interference of the nature above referred to.

The dividing line between circumstances which amount to intimidation or coercion and those which do not is shadowy and indistinct, and some courts, recognizing that the mere presence of pickets in itself often results in actual intimidation and in every case has a tendency so to do, have asserted the sweeping rule that picketing is unlawful *per se*.

Atchison etc. R. Co. v. Gee, 139 Fed. 582, 584.

Beck v. Railway Teamsters' Protective Union, 118 Mich. 497.

In Illinois the most recent decision of the Supreme Court upon the question of picketing is in the case of *Barnes v. Typographical Union*, 232 Ill. 424. The court there said at page 435:

“It is next contended that if any injunction was authorized, the injunction granted was too broad in enjoining appellants from peaceful picketing of complainants’ premises and from congregating about or near their places of business for the purpose of inducing or soliciting employes to leave the employment. It is contended that a peaceful picket line around a shop is entirely lawful. But this court has held otherwise in *Franklin Union v. People*, *supra*, where endorsement was given to the doctrine of *Beck v. Railway Teamsters’ Protective Union*, 118 Mich. 497, by quoting therefrom, as follows: ‘To picket complainants’ premises in order to intercept their teamsters or persons going there to trade is unlawful. It, itself, is an act of intimidation and an unwarrantable interference with the right of free trade. The highways and public streets must be free to all for the purposes of trade, commerce and labor. The law protects the buyer, the seller, the merchant, the manufacturer and the laborer in the right to walk the streets unmolested. It is no respecter of persons, and it makes no difference, in effect, whether the picketing is done ten or ten hundred feet away.’ The court also gave its approval to the decision in *Vegetahn v. Guntner*, 167 Mass. 92. In that case a patrol of two men in front of the plaintiff’s factory, maintained as one of the means of carrying out the defendants’ plan, was held to be an unlawful interference with the rights of the employer and the employed. The patrolling or picketing of the premises was considered to have elements of intimidation, and the court decided that the motive of obtaining better wages for themselves on the part of the defendants did not justify maintaining a patrol in front of the complainant’s premises as a means of carrying out their conspiracy. The very fact of establishing a picket line is evidence of an intention to annoy, embarrass and intimidate, whether physical violence is resorted to or not. There have been a few cases where it was held that picketing, by a labor union, of a place of business is not necessarily unlawful if the pickets are peaceful and well behaved, but if the watching and besetting of the workmen is carried to such a

length as to constitute an annoyance to them or their employer it becomes unlawful. But manifestly that is not a safe rule and furnishes no fixed or certain standard of what is lawful or unlawful. Any picket line must result in annoyance both to the employer and the workmen, no matter what is said or done, and to say that the court is to determine by the degree of annoyance whether it shall be stopped or not would furnish no guide, but leave the question to the individual notions or bias of the particular judge. To picket the complainants' premises was in itself an act of intimidation and an unwarrantable interference with their rights. Pickets were, in fact, guilty of actual intimidation and threats, but if they had not been, the complainants were entitled to be protected from the annoyance."

In *Franklin Union v. The People*, 220 Ill. 355, 379, the court said:

"The citizen, when engaged in lawful pursuits, must be accorded the right to walk the public streets of our cities and our country highways in absolute security and to go to and return from his home and place of business or employment without being interfered with. To follow him, to spy after him, to stop him and threaten him, to put him in fear, to intimidate him or to coerce him are alike unlawful. Intimidation and coercion are relative terms. What would put in fear a timid girl or weak woman or man might not terrorize the strong and resolute. All are alike entitled to the protection of the law."

Some doubt exists as to how far the above cases commit the courts of this state. It will be seen that the language in *Barnes v. Typographical Union*, *supra*, is broad enough, if taken literally, to condemn all picketing. The court said: "To picket the complainants' premises was in itself an act of intimidation and an unwarrantable interference with their rights." From a reading of the decision, however, I am of the opinion that it was not intended unqualifiedly to condemn in every instance the stationing of men in the street, and that if one or two strikers should be stationed at a place of business where a strike is in progress for the sole purpose of observing conditions, no injunction will be issued to enjoin them. The term "picketing" generally is given

the broader significance of a group of men stationed at a point for the purpose of intercepting employes or by their presence or conduct inducing them to leave their employment. It seems clear that strikers will not be denied the privileges of the street merely because a strike is in progress, without regard either to their conduct or their motive in being where they are. The court in the above case did not have under consideration a situation where one or two men were stationed in the street for the lawful purpose of observing conditions and in reason and upon authority, it would seem clear that no element of intimidation would be present under these facts.

In *Christensen v. Kellogg Switchboard and Supply Company*, 110 Ill. App. 61, 75, the court said:

“It is, we think, true that picketing or patrolling, when the terms are used to designate mere watching or being in the street, should not be enjoined * * *. There may doubtless be picketing and patrolling which are not unlawful.”

To the same effect is *Perkins v. Rogg*, 11 Ohio Dec. 585.

The court has, however, committed itself to the principle that the very fact of establishing pickets is, in general, evidence of an intention to annoy and intimidate. If their bearing or conduct, or if their numbers, are such as to be calculated to intimidate or annoy, or if the circumstances in any way indicate that it is their purpose to induce employes to quit their employment, it seems clear that under this decision they could be enjoined. Even more clearly, any interference with employes would place the stamp of illegality upon their presence. Many authorities hold that pickets may lawfully use peaceable persuasion to induce employes not to continue in their employment, provided the latter are not under contract.

Beaton v. Tarrant, 102 Ill. App. 124, 129.

Iron Molders' Union v. Allis-Chalmers Co., 166 Fed. 45.

W. & A. Fletcher Co. v. International Assn. of Machinists, 55 Atl. 1077, (N. J.).

Cumberland Glass Mfg. Co. v. Glass Bottle Blowers' Assn., 59 N. J. Eq. 49.

Krebs v. Rosenstein, 66 N. Y. Sup. 42.

Levy v. Rosenstein, 66 N. Y. Sup. 101.

Mills v. U. S. Printing Co., 91 N. Y. Sup. 185.

Union Pac. R. R. Co. v. Ruef, 120 Fed. 102.

Everett-Waddey Co. v. Richmond Typo. Union, 53 S. E. 273.

Foster v. Retail Clerks' Protective Assn., 78 N. Y. Sup. 860.

But even the courts which, in general, grant to pickets the right of peaceable persuasion hold that if the employes are under contract such conduct is unlawful. The authorities clearly establish the illegality of any conduct which is aimed to bring about a breach of an existing contract by one party thereto, with the attendant injury to the other contracting party.

Iron Molders' Union v. Allis-Chalmers Co., 166 Fed. 45, 50.

Doremus v. Hennessy, 176 Ill. 608, 614.

Lumley v. Gye, 2 E. & B. 216.

And in Illinois, under the decision in the Barnes case, it is clear that even in a case where the employes are not under contract the use of peaceable persuasion by pickets will be prohibited. The court there said:

"Another supposed right of the defendants asserted by counsel is the exercise of the power of persuasion, and it must be conceded that argument and persuasion are lawful if not directed to the accomplishment of an illegal and unlawful purpose. The object of the defendants as set forth in the bill was illegal, and if there is a malevolent intent to produce an illegal result, and it is produced, it makes no difference whether it is accomplished by mere persuasion or by physical violence."

The attention of your committee is further called to the fact that picketing may be used as a means of effecting a boycott and, if so, is unlawful for that reason. In *Wilson v. Hey*, 232 Ill. 389, 396, the court said:

"It is not wrong for members of a union to cease patronizing any one when they regard it for their interest to do so, but they have no right to compel oth-

ers to break off business relations with the one from whom they have withdrawn their patronage, and to do this by unlawful means, with the motive of injuring such person. Such means as giving notices which excite the fear or reasonable apprehension of other persons that their business will be injured unless they do break off such relations or cease patronizing another are wrong and unlawful. If the notices given or things done have the natural effect of exciting such reasonable fear and apprehension and accomplish the result intended, it is immaterial that they are not accompanied by direct threats. * * * It was understood by those who received the notices that if they continued to trade with appellees and did not break off existing business relations they would incur the hostility of the unions and their own business would suffer. The evidence shows that in this case, at least, the words 'unfair list' were a euphemism for a boycott, and, of course, it does not change the nature of an unlawful thing by substituting an inoffensive for an offensive name. The testimony was that the object of putting one on the 'unfair list' was, if the parties receiving a notice should keep on dealing with such person the unions would withdraw their patronage, and the only object of the whole proceeding was to coerce appellees by injuring their business with the public at large."

It follows, therefore, that if pickets in any case, by notices, threats or otherwise, create in the patrons of any person a reasonable fear that if they continue their patronage they will themselves be boycotted or otherwise injured, the picketing will partake of the unlawful character of the boycott itself and an injunction may be obtained to enjoin it.

Beck v. Railway Teamsters' Protective Union, 118 Mich. 497.

I have thus far considered the question as to the lawfulness of picketing from the standpoint of the right of the employer to secure an injunction to enjoin it. The conclusions at which I have arrived may be stated as follows:

While one or two strikers may, in my opinion, lawfully be stationed at a place of business where a strike is in prog-

ress for purposes of observation, yet if the circumstances are such as to indicate a purpose to induce employes to discontinue their employment,—if, for example, their bearing or conduct, or their numbers, are calculated to intimidate or annoy,—or if they beset or interfere with employes, by peaceable persuasion or otherwise, the picketing will be unlawful and may be enjoined. And, further, if the picketing is such as to create in the patrons of the proprietor against whom the strike is directed a reasonable apprehension that they themselves will receive injury if they continue their patronage, this also will be sufficient to give the picketing an unlawful character.

In conclusion I beg to call the attention of your committee to certain ordinances now in force which have a bearing upon the questions under consideration and which perhaps should be considered in connection with this opinion.

Section 2012 of The Chicago Code of 1911 provides in part as follows:

“All persons who shall collect in bodies or crowds for unlawful purposes, or for any purpose, to the annoyance or disturbance of other persons * * * shall be deemed guilty of disorderly conduct and upon conviction thereof shall be severally subject to a fine of not less than one dollar nor more than two hundred dollars for each offense.”

Section 2030 of The Chicago Code of 1911, as amended June 3, 1912 (Printed Journal, p. 623), provides:

“No person or persons shall obstruct or encumber any street corner, public place * * * by lounging in or about the same after being requested to move on by any police officer * * *. Any person or persons violating any of the provisions of this section shall be fined not less than five dollars nor more than fifty dollars for each offense.”

Very truly yours,

RALPH G. CRANDALL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTTELSON,

Corporation Counsel.

**Abatement of Nuisance of Weighing Station Maintained by
C. & N. W. Ry. Co.**

February 2, 1916.

HON. JOHN SIMAN, City Clerk, City of Chicago.

Dear Sir:

We are in receipt of your communication of the 22nd inst., submitting to this office a report by the Committee on Health of a meeting held on Thursday, January 20, with reference to the prevailing conditions surrounding the weighing station maintained by the C. & N. W. Ry. Co. at Kenton and Nevada streets. Answering the inquiry of the Health Committee as to the legal right of the city to abate the weighing station as a nuisance, or to cause such regulations as would give relief in the premises, we beg to advise you as follows:

By acts of the Legislature, the City Council may declare and define nuisances. Clause 66 of Sec. 1 of Article 5 of the Cities and Villages Act, Hurd's Revised Statutes, 1913, authorized municipalities:

“to regulate the police of the cities and villages, and pass and enforce all necessary police ordinances.”

Clause 75 of the same act authorized municipalities:

“to declare what shall be a nuisance, and to abate the same; and to impose fines upon parties who may create, continue, or suffer nuisances to exist.”

The City of Chicago acted under this authority, and in Sections 1424 to 1450, inclusive, of The Chicago Code of 1911, defined certain nuisances which may be abated by the City of Chicago, and provided for fines for their continuance. And by Section 1429 of the Code, the City Council Provided that:

“In all cases where no provision is herein made defining what are nuisances and how the same may be removed, abated or prevented in addition to what may be declared such herein, those offenses which are known to the common law of the land and the statutes of Illinois as nuisances may, in case the same exist within the city limits or within one mile thereof, be treated as

such, and proceeded against as in this article provided, or in accordance with any other provision of law."

Nuisances are either public or private.

"Private nuisances are injuries that result from the violation of private rights and produce damage to but one or a few persons, so that it cannot be said to be public.

"Public nuisances are such as result from the violation of public rights and producing no special injury to one more than another of the people, may be said to have a common effect and produce common damage."

Wood on Nuisances, (3rd Edition) Sections 14, 18.

There is no statutory provision nor any specific ordinance that defines the particular condition complained of as a nuisance, but under the common law a public nuisance has been defined as:

"A violation of a public right either by direct encroachment upon public rights or property, or by doing some act which tends to a common injury, or by omitting to do some act which common good requires, and which is the duty of a person to do and the omission to do which results injuriously to the public."

Wood on Nuisances, (3rd Edition) Section 17.

City of Chicago v. Shaynin, 258 Ill. 69.

City v. Tate, 130 Ill. 247.

"The question as to whether it is a public or private nuisance does not depend so much as to whether a large number of persons were annoyed by the act, but rather as to whether the act itself was such, and is in such a place as that the natural effect thereof would be to annoy or offend all who come within its sphere."

Wood on Nuisances, (3rd Edition) Section 71.

"In this class belong those cases which come under the head of making loud noises with instruments or otherwise in the night-time to the disturbance of the neighborhood."

In *Commonwealth v. Oaks*, 113 Mass., page 8, it was there held:

"Any use of property in a public place which endangers the safety, health or comfort of the public such

as * * * making of loud noises with instruments or otherwise in the night-time to the disturbance of the neighborhood, is a public nuisance, and may be avoided under the police powers of the municipality.”

In *Crump v. Lambark*, 9 L. R. 3 Eq. Cas. 409, the court in its opinion said:

“With reference to the question of law, I consider it to be well settled by numerous decisions, that smoke, unaccompanied with noise or noxious vapors, that noise alone, that offensive vapors alone, although not injurious to health, may severally constitute a nuisance to the owners of adjoining or neighboring property.”

After a careful review of many authorities, we are of the opinion that the offenses complained of constitute a public nuisance at common law.

People v. City of Chicago, 260 Ill. 150.

City of Chicago v. Shaynin, 258 Ill. 69.

“Nuisances may be divided into three classes: First, those which in their nature are nuisances *per se* or are so denounced by the common law or the statute; second, those which in their nature are not nuisances but may become so by reason of their locality, surroundings or the manner in which they may be conducted or managed; and third, those which in their nature may be nuisances, but as to which there may be honest differences of opinion in impartial minds.”

People v. City of Chicago, 260 Ill. 150.

The condition complained of herein cannot be classed as a nuisance *per se*, but it properly may come within the second classification, and under Section 1429 of The Chicago Code quoted above, the city could use its police power to abate said nuisance.

The fact that the business cannot be conducted without creating great noise or noxious odors, and that it is a useful and lawful business, is no defense, but rather a circumstance tending to establish a *prima facie* nuisance.

People v. City of Chicago, *supra*.

City of Chicago v. Union Stock Yards, 164 Ill. 224.

Illinois Central Railroad Company v. Grabiell, 50 Ill. 241.

Wood on Nuisances, (3rd Edition) Section 802.

“The power to abate a nuisance does not extend to the destruction of private property used in creating such nuisances which is susceptible to use for any lawful purpose.”

City of Chicago v. Union Stock Yards, *supra*.

City of Bushnell v. C. B. & Q. R. R. Co., 259 Ill. 391.

City of Chicago v. Shaynin, *supra*.

In a very elaborate opinion handed down by the Supreme Court in the case of *City of Bushnell v. C. B. & Q. R. R. Co.*, *supra*, wherein the right of a railroad company to maintain a certain nuisance was questioned, the court, in its opinion, on page 396, said as follows:

“The operation of the railroad is a lawful business, and if it enters the city it must cross the streets not only with its main tracks but with its sidetracks. The switching of cars and the use of locomotive engines for that purpose are necessary for the transaction of its business, and neither the existence of the sidetracks, nor their use in switching, nor the use of locomotives for that purpose, can be prohibited. The city has the authority, in the exercise of the police power, to regulate the manner of using the switch tracks so that they shall not be operated in a manner dangerous to the lives or limbs of persons using the streets, so that public travel and the use of the streets shall not be unreasonably interfered with, so that the community in the vicinity of the railroad shall not be put to unreasonable inconvenience in the use and enjoyment of their property.”

To the same effect see *Shively v. Ry. Co.*, 74 Ia. 169; *Missouri, Kansas and Texas Ry. Co. v. Anderson*, 36 Tex. Civ. App. 121; *City of Michory v. Southern Ry. Co.*, 141 N. C. 716.

A case directly in point is the *City of Chicago v. Union Stock Yards Company*, 164 Ill. 224, wherein a somewhat similar situation was involved. To show the similarity between the two cases we quote from the opinion of the court as to some of the facts and the findings of the court:

“* * * The proof, as made on this point by the city and not denied by the company, is, in substance, that when the road was first constructed it was outside of the city limits and ran through a sparsely settled community, and that by the annexation of Hyde Park and the Town of Lake it is now within the city limits, and that the lands in the immediate vicinity of the road have become occupied by the residences of many people; that churches, school houses and many costly residences are now located near appellee’s said road; that freight trains loaded with live stock, offal, manure and other noxious substances, are passing over or standing on these tracks almost continually, at all hours of the day and night; that the stench from the filthy cars, the smoke, dust and cinders from the overloaded engines, are carried into the houses, dwellings, churches and other buildings to such an extent as to be highly injurious to the comfort and health of the people there living or assembled, and to property, real and personal, situated near the road.

“* * * If it be conceded that, notwithstanding its charter, appellee may be restrained from transporting live stock over this road on the ground that the necessary result of such a use of the road is to maintain an intolerable nuisance injurious to the public health, in view of the changed condition of the locality from a sparsely settled to a populous district, it does not by any means follow that appellee may be compelled to remove the road itself. It is difficult to fix bounds to the general police power of the State, and it was held in *Butchers’ Union Co. v. Crescent City Co.*, 111 U. S. 746, that as to two subjects embraced in the general police power—that is to say, the public health and public morals—the legislature cannot limit the exercise of those powers to the prejudice of the general welfare. It was there said: ‘The preservation of these is so necessary to the best interests of social organization that a wise policy forbids the legislative body to divest itself of the power to enact laws for the preservation of health and the repression of crime.’ * * *

“* * * We agree with counsel for appellee that a distinction must be taken between the structure itself and the use to which it has been put. The unlawful use may be prevented without destroying the structure which has been lawfully erected. The power in the city to abate nuisances is not denied, but it does not

follow that the city may, as the easiest way to abate the nuisance, destroy valuable private property susceptible of use for a lawful purpose."

As to the claim of the company that the station was located at its present site before few, if any, of the homes were built, our Supreme Court in a number of cases has held:

"One cannot erect a nuisance upon his land adjoining vacant lands owned by another and thus measurably control the uses to which his neighbor's land may in the future be subjected. He may make a reasonable and lawful use of his land and thus cause his neighbor some inconvenience, and probably some damage which the law would regard as *damnum absque injuria*, but he cannot place upon his land anything which the law would pronounce a nuisance, and thus compel his neighbor to leave his land vacant or to use it in such way, only, as the neighboring nuisance will allow. And in *Laflin & Rand Powder Co. v. Tearney*, 131 Ill. 322, the court quoted with approval the following from Weir's Appeal, 74 Pa. St. 230: Carrying on an offensive trade for any number of years in a place remote from buildings and public roads does not entitle the owner to continue it in the same place after houses have been built and roads laid out in the neighborhood, to the occupants of which and travelers upon which it is a nuisance. As the city extends such nuisances should be removed to the vacant grounds beyond the immediate neighborhood of the residence of the citizens. This public policy, as well as the health and comfort of the population of the city, demands."

Oehler v. Levy, 234 Ill. 595.

City of Chicago v. Union Stock Yards, *supra*.

City of Bushnell v. C. B. & Q. R. R. Co., *supra*.

Under Section 221, Chapter 38, Hurd's Revised Statutes, 1913, Clause 8, the Legislature has defined it to be a nuisance

"to erect, continue or use any building or other place for the purpose of any trade, employment or manufacture, which, by occasional noxious exhalations, offensive smells or otherwise, is offensive or dangerous to the health of individuals or to the public."

Section 222 of the same chapter provides the penalty for such offense by a fine not exceeding \$100.00 for the first offense and a like fine for each and every offense continued thereafter, and imprisonment in the county jail not exceeding three months, and authorized the sheriff or other proper officer at the expense of the defendant, upon conviction, to abate said nuisance.

We are therefore, of the opinion, while the City Council has no authority to legislate as against this particular nuisance, nevertheless, under Section 1429 of the Code, we are convinced that this offense complained of constituted a public nuisance at Common Law and may be abated, but, that the city has no authority to cause the destruction of the weighing scale, but may regulate its use in such manner as to avoid the nuisance complained of.

Respectfully submitted,

DAVID T. ALEXANDER,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Employment of Special Counsel.

February 3, 1916.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

Replying to your inquiry in reference to the employment of special counsel for the city, we beg to say that this matter has been given an exhaustive study. We have had the benefit of suggestions from gentlemen now employed as special counsel, and others, as well as those of members of our regular office force, and have reached the following conclusions.

1. The corporation counsel is by statute made the head of the Law Department of the city and with the aid of his assistants is charged with the duty of conducting and fully

empowered to conduct all the law business of the city and its departments.

Chicago Charter of 1863, Laws of 1863, p. 50.

Hurd's Revised Statutes of 1913, ch. 24, Sec. 193a1, page 293.

Municipal Code of Chicago of 1905, p. 26,

Ramson v. Mayor, 24 Barb. (N. Y.) 227.

2. The provisions of The Municipal Code of 1905 in reference to the appointment of his assistants by the corporation counsel, as well as other matters in this connection, upon the adoption of the Act of 1905, became in legal effect a part thereof and were placed beyond the power of the City Council "to destroy by repeal." There is therefore vested in the corporation counsel a statutory right to appoint all assistants necessary to aid him in properly carrying on the law business of the city. So much of the Cities and Villages Act of 1872 as may be in conflict with such power of appointment is repealed by the Act of 1905. Assistants appointed for special work, commonly denominated "special counsel," when necessary, must be members of the Law Department and appointed by the corporation counsel. Any other appointment of special counsel is void.

Act of 1905, Hurd's Statutes, 1913, p. 293.

People ex rel. v. Supervisors, 100 Ill. 495, 502.

State v. Harder, 62 W. Va. 313, and cases there cited.

Loeffler v. People, 175 Ill. 885.

People v. McGann, 227 Ill. 567.

Fergus v. Russell, 270 Ill. 304.

3. Our conclusion that special counsel must be members of the Law Department and appointed by the corporation counsel renders it unnecessary to pass upon questions raised in this connection in reference to the Civil Service Act which by its own terms has no application to the Law Department.

4. Special counsel now acting could be reappointed by the corporation counsel and previous appointments rati-

fied by him as of the date thereof, in which case there would be no objection to the payment of their compensation on the ground of invalidity of appointment.

Yours very truly,

GEORGE E. CHIPMAN,

First Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

**Personal Expenses of County Judges Acting as Judges
of Municipal Court.**

February 3, 1916.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

Under date of January 28, 1916, Mr. L. E. Gosselin of the Department of Finance has referred the requisition from the Chief Justice of the Municipal Court, calling for personal expenses of Judges Robinson and Persons, to this department and has requested advice as to whether the comptroller can legally approve and pay bills of this nature.

Upon the bill for Judge Robinson appears, substantially, the following:

“For goods furnished to Chief Justice, Municipal Court * * * Articles and Description—Personal Expenses; Price—\$10.00; Units—8 Days; Amount—\$80.00.”

The other bill contains the like particulars. I assume that these charges are in reality for personal attendance and holding of court by said judges for the number of days indicated on said bills, although neither said bills nor the communication set forth this fact. If this assumption is not correct, will you please inform this department what the fact is in this respect?

Section 13 of the Municipal Court Act provides “that the judges of said Municipal Court may interchange with

judges of other city courts, and with county judges, and said respective judges may hold court for each other and may perform each other's duties when they find it necessary or convenient." The constitutionality of this section was passed upon by the Supreme Court in *American Badge Company v. Luna Park Improvement Association*, 246 Ill. 589, where at page 590 the court held as follows:

"This provision of the Municipal Court Act is incident to or in a reasonable sense connected with and auxiliary to the subject indicated by the title. If the dockets of the Municipal Court were overcrowded it would certainly tend to promote the administration of justice in that court to call in other judges under the provisions of said Section 13 to speedily dispose of the business of the court, thus preventing a denial of justice through long delay in the trial of causes."

This holding has been approved in *Gregory Printing Company v. Devoney*, 257 Ill. 399, and *City of Moline v. Chicago, Burlington & Quincy Railroad Company*, 262 Ill. 52. In the *American Badge Company* case Hon. George J. Cowing, County Judge of Will County, was sitting as a Municipal Judge and in the case of the *Gregory Printing Company*, Hon. Harry C. Ward, Judge of the City Court of Sterling, Whiteside County, was sitting as a Judge of the Municipal Court. In each of these cases the jurisdiction of said judges was sustained under said Section 13. I find nothing in either case that indicates that at the time they were holding court in the Municipal Court of Chicago there was a Municipal Court judge holding court in their respective jurisdictions and I do not understand that the interchange of judges provided for in Section 13, *supra*, means an actual exchange of judicial services between judges of the Municipal Court and outside judges at one and the same time, but that, whenever it may be found "necessary or convenient," judges of the Municipal Court of Chicago may serve in county courts and city courts as provided for in said Section 13 and the judges of county courts and city courts, respectively, may serve as judges of the Municipal Court of the City of Chicago. The correctness of this view, it

would seem, is definitely determined in the American Badge Company opinion, above quoted. For if it becomes necessary to call in outside judges to speedily dispose of the business of the Municipal Court, then certainly the chief justice would not at the same time make an arrangement whereby the regularly elected judges were sent outside of Chicago to hold court.

Under the head of "Salaries" the Municipal Court Act provides for annual salaries, therein specified, to be paid in monthly installments to the regularly elected judges of said court, but no provision is made for the payment of salary or compensation as such to outside judges who may be called to sit in the Municipal Court under authority of Section 13. The General Assembly did, however, provide for the payment of the expenses of the Municipal Court in Section 7 of said act as follows:

"That all blanks, books, papers, stationery and furniture necessary to the keeping of the records of the proceedings of such Municipal Court, and the transaction of the business thereof, shall be furnished the officers of such court at the expense of the city. All other expenditures on account of such court which may be authorized by the City Council, and which are not specifically mentioned in this act, shall be paid out of the city treasury."

I do not believe that the General Assembly intended, after authorizing the interchange of judges in Section 13 of the act, that outside judges should hold court for the City of Chicago at their own expense. On the contrary, I am of the opinion that the language of Section 7, that "all other expenditures on account of such court which may be authorized by the City Council, and which are not specifically mentioned in this act, shall be paid out of the city treasury," constitutes authority broad enough to cover the expenses of such outside judges incident to their holding court in the City of Chicago and that if the sum of ten dollars per day is a reasonable and proper charge to cover such expenses, the bills of the chief justice, transmitted by Mr. Gosselin's communication, are proper and may be paid if an

appropriation for such expenses has been or will be made by the City Council. Neither the bills nor the communication accompanying the same set forth when the expenses were incurred. If the expenses were incurred during the fiscal year of 1915, then the respective amounts would have to be paid out of appropriations made for that year, but if the expenses were incurred during the fiscal year of 1916, then they would have to be paid out of an appropriation to be made by the City Council in the annual appropriation bill to be passed during the first quarter of said fiscal year.

The requisition in this matter shows that it is handled through the business agent's office. While no inquiry upon this phase has been made, I deem it here proper to point out that in my opinion the business agent has no jurisdiction in such a case as this. Section 2517 of The Chicago Code of 1911 confers jurisdiction upon the business agent in all purchases of supplies and materials for the use of the city and to let all contracts to be performed for the city in cases wherein the cost shall be less than five hundred dollars. The service here to be performed in the Municipal Court certainly is not a supply, a material or labor as used in Section 2517, but is rather an official judicial service which is nowhere included in the provisions relative to the business agent. Section 2520 requires him to procure competitive proposals, to take advantage of the lowest prices quoted for goods of equal value and to procure sealed bids when the amount involved is below five hundred dollars, and Section 2520a authorizes him to make contracts for supplies and materials for a period not exceeding six months, when the aggregate cost thereof does not exceed twenty-five hundred dollars, and requires him to let such contracts to the lowest responsible bidder after advertising therefor in manner provided by ordinance. It can be readily seen that these provisions have no application whatever to the procurement of official judicial services as provided for in Section 13 of the Municipal Court Act. All that is necessary in said section, in order to authorize the chief justice to make such arrangements, is the inclusion of a proper appropriation by

the City Council in the annual appropriation bill as above set forth.

SUMMARY.

I am, therefore, of the opinion

(1) That Section 13 of the Municipal Court Act authorizes the engagement of county judges and judges of city courts to sit as judges of the Municipal Court and that Section 7 of the act authorizes the payment of their expenses while sitting as judges of the Municipal Court; and

(2) That the business agent has no authority, under the ordinances of the City of Chicago, to engage the services of outside judges to sit in the Municipal Court, but that such matters should be arranged by the chief justice of the Municipal Court after a proper appropriation for the same has been made by the City Council.

I return herewith the bills and duplicates which accompanied Mr. Gosselin's communication.

Respectfully submitted,

JAMES G. SKINNER,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Unrecorded Deeds and Tax Title of Jacob Glos on Property Abutting Certain Streets and Alleys to Be Vacated.

February 5, 1916.

HON. JOHN D. RILEY, Superintendent of Maps.

Dear Sir:

We are in receipt of your communication of January 29, 1916, in reference to advice as to the presentation of unrecorded deeds of property mentioned in your letter from Charles D. Clark to the Baltimore & Ohio Chicago Terminal Railroad Company, a corporation, dated January 27, 1916, and Henry Scherer to the Baltimore & Ohio Chicago Terminal

Railroad Company, dated January 7, 1916, conveying the fee title now of record in Charles D. Clark and Henry Scherer, and also whether you are justified in requesting said company to remove the tax title held by Jacob Glos to lots mentioned in your letter, the fee title being of record, according to your communication, in the Chicago Great Western Railroad Company, the Baltimore & Ohio Chicago Terminal Railroad Company being its successors, in order that the Baltimore & Ohio Chicago Terminal Company comply with the ordinance passed February 19, 1915. We quote that part of Section 12 of said ordinance under consideration:

"Section 12. The property herein required to be dedicated for alley purposes shall be shown upon a plat or plats to be properly executed and acknowledged by The Baltimore and Ohio Chicago Terminal Railroad Company and filed with the Recorder of Deeds of Cook County, Illinois, within one (1) year after the passage of this ordinance, and the vacation of any part of the streets or alleys above described and shown in red on the plat hereto attached shall not be in force and effect until The Baltimore and Ohio Chicago Terminal Railroad Company has acquired possession by purchase or otherwise of all the property abutting on any street or alley or any part of any street or alley to be vacated, and until properly executed and acknowledged plats showing the vacation of the various streets and alleys herein provided for shall have been filed for record by The Baltimore and Ohio Chicago Terminal Railroad Company in the office of the Recorder of Deeds of Cook County, Illinois."

Under said section, the vacation of streets and alleys does not become effective until the railroad company shall, within one year, acquire possession by purchase or otherwise of all the property opening on any street or alley to be vacated and until properly executed plats of streets and alleys vacated are recorded.

If the unrecorded deeds from Charles D. Clark and Henry Scherer to said railroad company have been delivered to and are in the possession of said railroad company, then the title to said premises has passed and the railroad com-

pany is the purchaser. We note, in the letter submitted with your communication, the copy of a receipt of a deed of said premises from Charles D. Clark by the Baltimore & Ohio Chicago Terminal Railroad Company by Jesse B. Barton, its general attorney, dated January 27, 1916. By the copy of deed submitted to us, it appears that the Baltimore & Ohio Chicago Terminal Railroad Company is in possession of the deed of title to the premises owned by Henry Scherer.

A deed of conveyance of land becomes effective from its delivery, if at all, to the grantee and the recording of the deed does not pass title but secures title from being defeated by subsequent sale to innocent purchasers. The ordinance does not require that the purchaser record the title. As to Lots 26, 35, 36 and 37, you show the title of record in the Chicago Great Western Railroad Company and we are informed by Jesse B. Barton, general attorney for the Baltimore & Ohio Chicago Terminal Railroad Company, that the Baltimore & Ohio Chicago Terminal Railroad Company is the successor to said property by securing title by master's deed through foreclosure proceedings against the Chicago Great Western Railroad Company. Not only that, but the Baltimore & Ohio Railroad Company is now and has been in possession of said lots for a number of years by having several tracks laid across the same. The tax deed of Jacob Glos would only be a cloud upon the title to said premises.

We are, therefore, of the opinion that if the unrecorded deeds from Charles D. Clark and Henry Scherer have been delivered and are in the possession of the Baltimore & Ohio Chicago Terminal Railroad Company, and the Baltimore & Ohio Chicago Terminal Railroad Company is the successor of the Chicago Great Western Railroad Company's property, then upon presentation of the unrecorded deeds by the Baltimore & Ohio Chicago Terminal Railroad Company and further evidence that it is the successor to the property of record in the other railroads and has otherwise complied with the ordinance by acquiring possession by purchase or otherwise of all the property abutting on any street or alley

or any part of a street or alley to be vacated, there would be a compliance with the ordinance in that respect.

Yours very truly,

BENTON F. KLEEMAN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

**Liability of Sanitary District for Payment of Repairs at
No. 712 South Halsted Street.**

February 7, 1916.

HON. WM. G. KEITH, Commissioner of Gas and Electricity.

Dear Sir:

We are in receipt of your communication of the 14th inst., making inquiry as to the construction of the contract entered into between the City of Chicago and the Sanitary District on October 3, 1910, relative to the repair of roof of building at No. 712 South Halsted street, together with correspondence had between the City of Chicago and the Sanitary District attached to your letter.

The contract entered into between the City of Chicago and the Sanitary District discloses that the City of Chicago delivered to the district the possession and use of the stations mentioned in the contract, and gave permission to the said district to use for its corporate purposes "all space in said stations which is not now used or which said space may not at any time hereafter during the life of this contract be required by said city for any municipal legal purposes."

Section 8 of the said contract, whereby the repair and maintenance of the sub-stations and equipment are provided for, is as follows:

"8. Said district agrees to accept, receive and take over the possession of said sub-stations, transformers, regulators, meters, machinery, tools, appliances,

transmission lines and other electrical equipment described in Exhibit A hereto attached, and hereby agrees to superintend, repair, manage and operate the same during the life of this contract, and will furnish without cost to said city all necessary supplies, material and labor to maintain and keep the same during the life of this contract in as good repair as when delivered to said district, depreciation from wear and tear excepted. It being expressly understood and agreed, however, that said district shall be authorized to make, at the expense of the city, such repairs to said electrical equipment, so turned over by said city to said district as may be agreed upon between the city electrician and the electrical engineer of the district are necessary to place same in operative condition, provided that all such repairs provided for hereunder shall be made within the period of three months from the time said property is taken over by said district."

Section 17 of the said contract makes reference to the payment by the City of Chicago to the Sanitary District for repairs made, and it is as follows:

"17. Said city hereby agrees to repay to said district such sums of money as said district shall expend and pay for the acquisition of real estate required and for all labor and material used in constructing said sub-stations, and in rearranging, making the repairs hereinbefore provided for, furnishing and installing the cables, wires, conduits, poles, towers, lamp-posts, arc lights, and all machines, devices, and in general all the electrical equipment which shall be necessary to install the present and new electrical system of said city as in this contract provided in the following manner:
* * *"

While at first glance there appears to be somewhat of a conflict between the two last sections as to the repair and maintenance of the sub-stations and the payment therefor, nevertheless, we are of the opinion that Section 17 referring to the payment "to said district such sums of money as said district shall expend and pay for the acquisition of real estate required and for all labor and material used in constructing said sub-stations, and in rearranging, making the

repairs hereinbefore provided for," refers to and applies to the latter part of Section 8, which is as follows:

"It being expressly understood and agreed, however, that said district shall be authorized to make, at the expense of the city, such repairs to said electrical equipment so turned over by said city to said district as may be agreed upon between the city electrician and the electrical engineer of the district are necessary to place same in operative condition, provided that all such repairs provided for hereunder shall be made within the period of three months from the time said property is taken over by said district."

It has been uniformly held by our courts, that in construing a contract, the court will, if necessary, put itself in the place of the parties and read the contract in the light of the object they had in view and the circumstances surrounding them, and in the construction of written contracts the controlling condition is always to arrive at the intent of the parties, and in doing this every part of the instrument is to be considered and properly weighed, so as to give to every sentence, phrase and word of the entire instrument, force and effect. That being the rule, from a careful reading of the contract, we are of the opinion that it was the undoubted intention of the parties that the Sanitary District, during the life of the contract, agreed to keep and maintain in good repair, ordinary wear and tear excepted, such sub-stations as were by the city turned over to it, and that for repairs as provided for in the latter part of Section 8 of said contract, the city was to make payment to the Sanitary District.

Under the terms of the agreement the district is required to keep and maintain the sub-stations in good repair. A covenant such as this is generally construed to mean and imposes on the covenantor the legal obligation to keep the premises in as good repair as when the agreement was made, but it does not, however, require the lessee to make repairs necessitating radical changes in the structure of a permanent, substantial or unusual character.

Barnhart v. Boyce, 102 Ill. App. 173.

Peck v. Scoville, 43 Ill. App. 361.

Spiking v. Fox, 145 Ill. App. 337, 24 Cyc. 1008.

The general rule is that, where a tenant covenants to keep the premises in repair during the term, at the expiration thereof to surrender them in like condition, and he omits to make the necessary repairs, the landlord's right of action accrues forthwith and he need not wait until the end of the term. This omission on the part of the tenant amounts to a violation of one of the covenants in the lease and in that way the lessor would have the right to take proper action to enter the premises and make the necessary repairs. An action for the cost thereof, or an action for damages, could be had against the tenant. It has also been generally held that in the absence of a stipulation in the lease to that effect, the landlord cannot enter on the leased premises during the term to make repairs, but it would be otherwise if the omission amounted to a violation of one of the conditions of the lease. This, however, is not the case in the contract in question, so that the city would not have the right, without express stipulation, to enter on the premises and make the repairs at the expense of the Sanitary District until after the expiration of the contract.

As to the character of the repairs, we are of the opinion that if the deflected condition of the roof was caused by some act of the Sanitary District subsequent to the entering into of the contract, then in that event the Sanitary District could be held liable for the consequent repairs. In the case of *Thomas v. Conrad*, 71 S. W. 903, a lease of the building provided that the lessee should keep the property in the same repair as upon the completion of certain improvements, "natural wear and tear excepted," and to surrender them in as good condition as received, "natural wear and tear and natural decay and injury, or destruction by any cause not their fault, excepted." It was there held that while the lease imposed no obligation on the lessee to repair the injuries caused by natural wear and decay, it did not require the landlord to repair the roof, destroyed by natural wear and decay.

We are, therefore, of the opinion that under the terms of this contract the Sanitary District obligated itself to keep the roof in good repair and, after a proper notice sent to them by your office to make such repairs, a refusal on their part would give the City of Chicago a cause of action against them for any damages the city may sustain on account of their refusal, and at the expiration of the contract the city may go in and make the necessary repairs, making a charge therefor against the Sanitary District.

Respectfully submitted,

DAVID T. ALEXANDER,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Acceptance of Dedication of Street.

February 9, 1916.

HON. JAMES A. KEARNS, Chairman, Committee on Compensation.

Dear Sir:

We are in receipt of yours of February 3, with reference to an ordinance providing for the vacation of the northerly 27 feet of Grand avenue between North Kedzie avenue and Augusta street, and asking for information as to whether or not the facts set forth in your letter constitute an acceptance on behalf of the city of the entire width of the street.

On October 27, 1869, the Legislature passed an act to amend the charter of the City of Chicago to create a board of park commissioners and authorize a tax in the Town of West Chicago, and for other purposes. The act provided for the extension of the city limits, which included the subdivision in the Town of West Chicago, and the act also created the Board of the West Chicago Park Commissioners. Section 7 of said act provided, in substance, that no sub-

division should be laid in the lots of any lands in said town without the approval of said Board of West Chicago Park Commissioners. Section 9 provided that the board of park commissioners be required to make not less than three surveys and examination of different routes for boulevards and outlines of parks and, before locating the same, to invite owners of property to confer with them in regard to donations of land. Section 10 of the act provided that the Board of Public Works be authorized and required, upon the order of the Common Council of the City of Chicago, to widen "Whiskey Point Road" (changed and named Grand avenue therein) to 120 feet from Western avenue to the new, or extended, city limits, and which abuts on the block now in question.

In anticipation of the action required to be taken by said board, the property owners along Grand avenue and, among others, the owners in the block in the subdivision in question, in the year 1872 dedicated, by plat, 60 feet as their half of Grand avenue fronting on said block, and also marked on said plat—in what purports to be the center of Grand avenue—"120 ft.," intending that this should be the full width of Grand avenue. The plat was approved by the West Chicago Park Commissioners on the 27th day of July, 1871, and was approved by the Board of Public Works of Chicago on June 26, 1872. Same was recorded in the recorder's office on July 1, 1872, in Book 1 of Plats, page 81.

The Board of Public Works never did take any action as provided for in said act, and, in consequence, there are 27 feet in said block in excess of the uniform width of the rest of the street, which purports to be 66 feet, and to which no acceptance by the public can be proven.

There is no doubt but that the property owners dedicated 60 feet for street purposes and that in so doing it was their intention that Grand avenue should be a 120-foot street. In 1872 the property owners directly across the street subdivided their land, showing by plat 33 feet dedicated as their one-half of said street, and described by a note on the face of the recorded plat which reads as follows:

“The westerly $\frac{1}{2}$ of Grand avenue to be made 60 ft. wide by reducing the depth of lots fronting thereon in the subdivision as soon as Grand avenue shall be made 120 ft. wide from Western avenue to present city limits free of expense to this property.”

The subdivision in question was not platted according to statute, since the same was acknowledged by certain owners by their attorney-in-fact. This was contrary to the act providing for the recording of town plats in force February 27, 1833. The legal title of the street, therefore, did not vest in the City of Chicago, but in the original owners.

Gosselin v. City of Chicago, 103 Ill. 623.

There never was an acceptance by the City of Chicago of the full 60 feet width, the Board of Public Works never having taken any action to make Grand avenue a 120-foot street, as provided for in the Act of 1869. In order to make a complete dedication of streets and alleys by the making, acknowledgment and recording of a town plat, the acceptance by the municipal corporation is necessary. Until acceptance, the fee does not vest in the corporation, but remains in the original proprietors.

Hamilton v. C. B. & Q. R. R. Co., 124 Ill. 235.

With the exception of the subdivision containing the 27 feet in question, the city has allowed sidewalks to be constructed in Grand avenue within the width which shows a 66-foot street, and a sidewalk was constructed by the owners on the disputed space, as you state, within one foot of the north line thereof, which would show a 120-foot street. But on the opposite side of the street a sidewalk was laid so as to indicate an acceptance by the city of only a 66-foot street, and all the sidewalks on Grand avenue have been laid, which would indicate the acceptance of Grand avenue by the city as a 66-foot street.

We presume the property owners in question, subsequent to the act of the city in allowing sidewalks to be constructed showing Grand avenue as a 66-foot street, took action to vacate and file for record a deed of vacation, dated

July 31, 1913, of the 27 feet in question, which, to all intent, appears to have been done in accordance with the statute in such cases made and provided.

Subsequently, in the year 1915, by special assessment, Grand avenue was paved with brick as a 42-foot roadway, and new sidewalks have been constructed within a width showing a 66-foot street, which would indicate that the city abandoned the idea of making Grand avenue a 120-foot street, as provided in the Act of 1869.

We are, therefore, of the opinion that there was not an acceptance by the city of said 27 feet in question and that there was a valid vacation by deed filed of record by all the property owners, and we would advise that, in order to establish a uniform width of Grand avenue so that the same may appear of record for the information of the several departments of the city, the City Council pass an ordinance vacating the same.

Very truly yours,

BENTON F. KLEEMAN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Automatic Cashier and Discount Machines.

February 11, 1916.

HON. CHARLES C. HEALEY, General Superintendent of Police.

Dear Sir:

We have your letter of the 13th inst., with enclosure of a communication from Brady, Rutledge & Devaney, attorneys, relative to the automatic cashier and discount machines.

In the opinion rendered by this department, dated December 27, 1915, we stated that these machines may be used for gambling purposes and will fall within the classification of gambling devices when operated without their

signs being lighted at all times, or by persons unfamiliar with the use of the discs upon the side of the machines and the value of the trade checks which will be obtained by successive plays.

As stated in our former opinion, by referring to the discs upon the side of the machine, it is possible for one familiar with their use to find out before inserting any money what the result of successive operations will be. When the machine is operated by a person who possesses the information that may be thus obtained the element of chance is lacking and there is no possibility of the operation being regarded as gambling. In order to constitute a machine a gambling device it is essential that there should be a possibility of staking money on its operation in the hope of winning the equivalent of a sum in excess of the amount used in operating the machine.

In order to remove the objections that persons operating these machines may not know of the discs above mentioned or may not understand their purpose, we are advised that the Almy Manufacturing Company, manufacturer of the machines, proposes to place a card upon the front of each machine of which it is the owner, which will contain a chart and an explanation as to how the operator may know what he will receive upon any number of successive operations. We are of the opinion that if the lettering on the card is large and in bold type, and the card itself is of sufficient size and in such a conspicuous position as to at once attract the attention of any operator, it will, if adequate to inform the reader as to what successive operations will yield, serve to prevent the use of the machine for gambling purposes. We, therefore, recommend that in your order to commanding officers, you state that automatic cashier and discount machines, having a card answering the above description in a conspicuous place upon the front of the machine, do not violate the statutes and ordinances relating to gambling devices and shall be allowed to operate, but that any machines which do not exhibit a card of this character shall be seized when evidence is obtained that they are operated without having the signs illuminated or are oper-

ated successively for the purpose of winning trade checks by persons unfamiliar with the use of the discs and who do not know the value of the trade checks which will be obtained.

We wish to call your attention to one further feature of the machine which may render it, in certain cases, objectionable to the city ordinances. Section 2024 of The Chicago Code of 1911, as amended April 28, 1913 (Printed Journal, page 225), provides as follows:

“It shall be unlawful for any person to exhibit, sell or offer to sell, or circulate or distribute, any indecent or lewd book, picture or other thing whatever of an immoral or scandalous nature, or to exhibit, in any place where the same can be seen from the public highway or in a public place frequented by children which is not connected with any art or educational exhibition, any picture representing a person in a nude state, or to exhibit or perform any indecent, immoral or lewd play or other representation under a penalty of not less than twenty dollars (\$20.00) nor more than one hundred dollars (\$100.00) for each offense.”

If pictures are exhibited in these machines which fall within the classification mentioned above and the other conditions set forth in said ordinance are met, the lessees or keepers of the machines will render themselves liable to the penalty therein provided for.

Yours very truly,

RALPH G. CRANDALL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTTELSON,

Corporation Counsel.

Construction of Subway under Local Improvement Act.

February 11, 1916.

HON. M. J. FAHERTY, President, Board of Local
Improvements.

Dear Sir:

We are in receipt of your letter dated February 4th, in which you refer to an opinion by Harry F. Atwood, Attorney

of the Board of Local Improvements, and Eugene H. Dupee, Assistant Corporation Counsel, dated November 17, 1915, which held that a comprehensive subway system would constitute a local improvement which the city has power to construct under the provisions of the Local Improvement Act of 1897, and requesting an opinion of this department as to whether the city's share of the cost thereof may be paid out of the "Traction Fund" provided for in the traction ordinances of the city.

Section 39 of the Local Improvement Act provides as follows:

"It shall be the duty of such officer (the superintendent of special assessments) to estimate what proportion of the total cost of such improvement will be of benefit to the public and what proportion thereof will be of benefit to the property to be benefited, and to apportion the same between the city, village or town and such property so that each shall bear its relative equitable proportion; and having found such amounts, to apportion and assess the amount so found to be of benefit to the property upon the several lots, blocks, tracts and parcels of land in the proportion in which they will be severally benefited by such improvement; provided, that no lot, block, tract or parcel of land shall be assessed a greater amount than it will be actually benefited;
* * *

The portion of the cost of any local improvement which is borne by the city is ordinarily paid out of funds raised by general taxation, viz: out of the corporate fund of the city, the money so paid representing the extent to which the general public is benefited by the improvement. Section 4 of said act provides as follows:

"When any such city, town or village shall by ordinance provide for the making of any local improvement, it shall by the same ordinance prescribe whether the same shall be made by a special assessment or by special taxation of contiguous property or general taxation, or both."

We are of the opinion that the act in question was not intended in any way to limit the right of the city to apply

other funds than those raised by general taxation to the payments above referred to. If, viewing the question independently of said act, the city may rightfully use the money of the "Traction Fund" for the purpose of constructing subways, we believe that this right may be exercised by the city for the purpose of meeting its share of the cost of such improvement when the work is done under the provisions of the act in question.

The power of the City to use the "Traction Fund" for the purpose of acquiring or constructing subways has been clearly affirmed by the Supreme Court of Illinois in the case of *Barsaloux v. City of Chicago*, 245 Ill. 598, 611. The court said:

"The only remaining question requiring consideration is whether the city may use the special traction fund for the purpose of acquiring or constructing subways. Section 24 of the traction ordinance provides that the city shall deposit fifty-five per cent of the net earnings of the traction companies to the credit of a separate fund, to be kept and used for the purchase and construction of street railways by said city. Under this ordinance clearly the city would have no power to divert this fund to general corporate purposes, but using it to construct subways is not a diversion of such fund. The construction of subways is the construction of street railways, and is therefore the identical purpose for which such fund may be used. The city is not however, limited to the use of this fund, alone, for such purpose. Any available funds not otherwise appropriated in the city treasury may properly be applied to the construction or purchase of subways. * * *

"There is, in our opinion, no valid objection to using the traction fund, or any other available corporate funds, for the purpose of acquiring or constructing subways in the streets of the city."

There seems to be no ground for holding that the decision of the above case does not apply where the construction of the subway by the city is done under the provisions of the Local Improvement Act and a portion of the cost thereof is defrayed by special assessment, as well as if the improve-

ment were built independently of that act and the cost thereof were not imposed in any degree upon the property owners.

We are clearly of the opinion that, assuming the right of the city to construct a subway under the act in question, it has the right to use the "Traction Fund, or any other available funds" in meeting its share of the cost.

Very truly yours,

RALPH G. CRANDALL,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Record of Automobiles in Public Garages.

February 11, 1916.

THE HONORABLE CITY COUNCIL, City of Chicago.

Gentlemen:

Under date of January 31st, your Honorable Body passed the following order:

"ORDERED, That the corporation counsel be and he is hereby requested to prepare and submit to the council an opinion as to the powers of the City of Chicago to require the proprietors of all public garages to maintain a record, open at all times to the police department officials or other accredited authorities, showing the identity of all automobiles and motorcycles occupying space in their respective garages, indicating the name of owner, with description, if not properly identified, complete description of car, including various numbers and other distinguishing marks."

The City of Chicago derives its power in reference to the matter in question under Clause 82, Section 1 of Article 5 of the Cities and Villages Act, which is as follows:

"The city shall have the power * * * to direct the location and regulate the use and construction of breweries, distilleries, livery, boarding or sale stables,

blacksmith shops, foundries, machine shops, garages, laundries and bathing beaches, within the limits of the city or village.’’

This clause was construed in the case of *People v. Erickson*, 263 Ill. 369, which held that an ordinance which required persons desirous of erecting *garages* to secure the consents of a majority of the property owners for the location of a garage in any block in which two-thirds of the buildings on both sides of the streets are used exclusively for residence purposes was valid. The Supreme Court, speaking by Chief Justice Cooke, says:

“The power of the Legislature to regulate such a business is in no way dependent upon the question whether it is a nuisance *per se*. It is of such a character that it becomes a nuisance when conducted in particular localities and under certain conditions, and it is clearly within the province of the Legislature, in the exercise of the police power, to authorize the municipalities of the state to direct the location of public garages.

“While the identical question involved here was not there raised, this same statute, as applied to a livery stable, was held valid in *City of Chicago v. Stratton*, 162 Ill. 494. Since that time it has been amended so as to include garages. The act is not subject to the objection made, and as the ordinance was passed by the express authority conferred by this statute, it is valid unless unreasonable in its requirements.

“Appellees contend that as the ordinance was passed under the express authority given by this section of the statute the courts will not inquire into the reasonableness of the provisions of the ordinance. This statute, in general terms, empowers the municipalities of the state to direct the location and regulate the use and construction of garages. It gives no detail as to the manner in which this direction and regulation shall be exercised. Under those circumstances, the city availing itself of this statute must be reasonable in the terms which it imposes by its ordinances. In discussing this question in *Chicago and Alton Railroad Co. v. City of Carlinville*, 200 Ill. 314, we said: ‘The books and reported cases seem to agree that courts may declare void an ordinance passed by a city or village by virtue

of its implied powers, if, in the opinion of the court, it is unreasonable; but when the ordinance is passed by express authority conferred upon the municipality by the Legislature such power is not so clear, and there is conflict of authority upon that proposition. (*Burg v. Chicago, Rock Island and Pacific Railway Co.*, 90 Iowa 106.) The rule adopted in this state is, that where the ordinance is passed in pursuance of power expressly conferred by the Legislature and the details of such municipal legislation are prescribed by the Legislature, an ordinance passed in pursuance of such power cannot be held invalid by the courts as being unreasonable; but when the details of such legislation are not prescribed, an ordinance passed in pursuance of such power must be a reasonable exercise thereof or it will be pronounced invalid. * * * The requirement that the person desiring to construct or maintain a garage in any block in which two-thirds of the buildings on both sides of the street are used exclusively for residences shall procure the written consent of a majority of the property owners, according to frontage, on both sides of the street, is not unreasonable."

In Bouvier's Law Dictionary the word "regulate" is defined as meaning "to direct by rule or restriction."

In *Gundling v. City of Chicago*, 176 Ill. 340, which was appealed to the Supreme Court of the United States and reported in 177 U. S. 183. The Supreme Court of the United States held that the ordinance requiring a bond and placing other restrictions upon persons engaged in selling cigarettes was a valid exercise by the city of the police power of the state.

In *City v. Bowman Dairy Co.*, 234 Ill. 294, the regulation of milk bottles was held valid.

In *Cusack v. City*, 267 Ill. 344, the regulation of bill boards was held a valid exercise of the police power although a prior ordinance for the regulation of bill boards was held invalid in *City v. Gunning System*, 214 Ill. 628, and a statute of a somewhat similar nature was held unconstitutional in *Haller Sign Works v. Physical Culture School*, 249 Ill. 436.

In the case of *City v. Cusack*, the court says:

“In *Haller Sign Works v. Physical Culture School*, 249 Ill. 436, we held a statute which prohibited the erection of any character of signs for advertising purposes within five hundred feet of any public park or boulevard, illegal and void, for the reason that it did not tend to promote the safety, health, comfort or general welfare of the public, but was manifestly passed solely from aesthetic considerations. The ordinance here under consideration is not open to the objections that were apparent upon the face of the statute in the *Haller Sign Works* case, and the evidence in the record clearly distinguishes this case from the *Gunning System* case.

“The ordinance is not unreasonable or oppressive because it requires the consent of a majority of the owners of property, within certain limits, on both sides of the street where such bill-boards are to be erected. In respect to occupations or structures the location and maintenance of which are subject to regulation under the police power of the municipality, a requirement of frontage consents of property owners, within reasonable limits, is a proper mode of exercising the power of regulation vested in the municipality.”

In the case of *City v. Netcher*, 183 Ill. 104, in which the court held that an ordinance prohibiting the sale of certain articles of merchandise by department stores was void, it laid down the following rule or test:

“In order to sustain legislative interference with the business of the citizen by virtue of the police power it is necessary that the act should have some reasonable relation to the subjects included in such power. It is claimed that if the statute or ordinance is referable to the police power the court must be able to see that it tends, in some degree, towards the prevention of offenses or the preservation of the public health, morals, safety or welfare. It must be apparent that some such end is the one actually intended, and that there is some connection between the provisions of the law and such purpose.”

In *McQuillin on Municipal Corporations*, Vol. 3, Section 911, page 1951, it is said:

“An automobile garage is not necessarily a nuisance *per se*, though it may be so conducted as to become

such, and hence, the power of the corporate authorities to regulate its location, erection and conduct must be admitted."

For the above reasons I am of the opinion that the City of Chicago has the power to require the proprietors of all public garages to maintain a record open at all times to the police department officials or other accredited authorities, showing the identity of all automobiles and motorcycles occupying space in their respective garages, indicating the name of owner, with description if not properly identified, complete description of car, including various numbers and other distinguishing marks.

Very truly yours,

MORTON S. CRESSY,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Meaning of Term "Seller" in Meter Testing Ordinance.

February 15, 1916.

HON. JOHN P. GARNER, Commissioner of Public Service.

Dear Sir:

Your communication of February 10, 1916, asking for an opinion as to whether the term "seller" referred to and defined in paragraph 1, Section 3, of the meter testing ordinance, passed by the City Council, July 15, 1915 (Journal of Council Proceedings, pages 1359-65), applies to private plants and jobbers of electricity, has been referred to me.

In reply thereto beg to state that Section 1 of said ordinance, defining the duty of the said ordinance in regards to meter testing states:

"That the commissioner of public service shall provide for test, inspection, sealing and adjustment, * * * of all meters * * * used or to be used in the City of Chicago,"

and paragraph 2 of Section 3 provides that:

“The term ‘meter’ when used in this ordinance shall mean and include each and every electrical device that is used in the City of Chicago *for the purpose of measuring the electricity supplied to any consumer thereof.*”

Paragraph 1 of Section 3 defines in unambiguous terms the term “seller” and states that the same

“shall mean and include any corporation, company, association, joint stock company or association, firm, partnership, managing committee or individual, etc. * * * that now or hereafter may own, control, operate or manage directly or indirectly, any plant, equipment or property used in connection with the production, storage, transmission, sale, delivery or furnishing of electrical energy within the City of Chicago, may offer such utility for sale to the public, * * *.”

From the above, I am of the opinion that term “seller” as used in the ordinance, includes and applies to private plants and jobbers of electricity, and that, therefore, their meters should be tested in accordance with the terms of the above mentioned ordinance, if the said private plants and jobbers of electricity have offered for sale within the City of Chicago electrical energy.

Yours very truly,

DANIEL A. ROBERTS,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Opening of East 103rd Street.

February 16, 1916.

HON. EDWARD J. GLACKIN, Secretary, Board of Local Improvements, City Hall.

Dear Sir:

Your letter of January 17, 1916, has been referred to me for consideration. You say that some four years ago

Mr. Nicholas Michels, then assistant corporation counsel, rendered an opinion on the opening of East 103d street.

You say that, in accordance with the Michels opinion, condemnation proceedings were instituted for the opening of East 103d street, but recently doubt has been expressed as to the legality of the vacation instrument of the Calumet & Chicago Canal & Dock Company, and that to be certain of your ground you asked for an opinion from your law department which was submitted to you under date of December 27, 1915, said opinion having been written by Harry F. Hamlin, Assistant Corporation Counsel, and approved by Harry F. Atwood, Attorney for Board of Local Improvements.

These opinions are diametrically opposed to each other, and in view of this fact and of the relative importance of this matter, we had the Map Department make a report of the exact conditions of this subdivision in the way of improvements, council proceedings and other things that might show that the vacation was invalid and that the streets were accepted and belonged to the city. To aid the consideration of this case, we herewith attach the report of Mr. John D. Riley, Superintendent of Maps, signed by George Inman; attached also to Mr. Inman's report is a carefully compiled map showing the conditions as they prevail. Mr. Hamlin in his opinion finds that the City of Chicago did not accept these streets, and bases his opinion on the case of *Moore v. City of Chicago*, 261 Ill. 56, wherein it was held that the public authorities are not bound to accept all of the streets and public grounds shown on the plat of the subdivision and the acceptance of a part of the dedication is not an acceptance of all. In all of these cases there cannot be any general rule adhered to, but each case must stand alone on the facts as they appear before the court.

In the case of *Moore v. City of Chicago*, *supra*, there was nothing done by the City of Chicago that would indicate that there was an acceptance, except that thirty-three feet of the bordering street of the subdivision was accepted by the city and the identical state of facts applied in the case of *Casey v. City of Chicago*, 263 Ill. 147, which was decided subsequently,

but the facts in those two cases do not by any means conform to the facts in this case. On the other hand, the facts in this case are very similar to the facts on which the Supreme Court bases its opinion in the case of *Kimball v. City of Chicago*, 253 Ill., page 112; there the court said in speaking of the acceptance:

* * * "An acceptance may be express, as by some positive act of the municipality evidenced by an ordinance or resolution, or an acceptance may be implied from the acts of the city or the public, as by making improvements or by travel; and where it clearly appears that the principal streets and alleys of a subdivision have been accepted by the municipality, the presumption then obtains that all the streets and alleys of the subdivision have been accepted, unless there is something which shows the acceptance to have been limited, and there is no proof in this record that the city declined to accept any portion of the plat, and that being true, the acceptance of a part was an acceptance of the whole plat." * * *

In this case the subject-matter was an alley on which it did not appear there were any improvements or anything done by the city that would indicate an acceptance of that particular alley, but most all the other streets and alleys in the subdivision were accepted. On this account the court concluded that an acceptance of a part of the subdivision was an acceptance of the whole.

In the Calumet & Chicago Canal & Dock Company case in question the following facts tend to show the acceptance of all the streets and alleys in the subdivision:

1. As early as 1875 and as late as 1913 the said company sold lots in Blocks 190, 191, 195 and 196 and in some of these blocks improvements have already taken place and none of the lot holders in these four blocks have joined in the deed of vacation.

2. In November, 1905, the City of Chicago built a water main in front of the south side of blocks 194 and 195, which extended in Bensely avenue south on the west side of block 195 to 103d street. About the same time or prior

thereto the City of Chicago built a sewer in Calhoun avenue from 106th street to 103d street, which extends along the west side of block 194 from 104th to 103d streets, and it also built a sewer on Hoxie avenue from 106th street to 103d street on the east side of block 194.

3. A sewer was also built extending entirely across the subdivision east and west at 103d street, bisecting the subdivision about in the middle. Also a sewer was built on 99th street along the entire southern border of the said subdivision. These two sewers were completed on or before November 19, 1909.

4. An ordinance was passed by the City Council and was recorded on June 9, 1909, in the recorder's office of Cook County, vacating certain streets and alleys in the subdivision; also an ordinance was passed April 22, 1912, and recorded May 15, 1912, vacating certain other streets and alleys in the subdivision. It will be noticed by referring to the map attached hereto that on each side of the sewer in 103d street and 99th street there are little round dots marked in red. These indicate catch basins which were built at the corner of each intersecting street north and south and were built for the purpose of connecting with the sewers in those streets at some future time.

The building of a sewer on each side of blocks 198 and 194 and the laying of the water main between the two blocks 195 and 194 and on each side of these blocks indicate an acceptance of these blocks without any question and the fact that the catch basins were built at the corner of each intersecting street north and south was also an act of acceptance just as much so as if the City of Chicago had planted lamp posts where the catch basins are. This fact alone proves the intention of the city to accept all these streets; besides this the building of the sewer through the middle of the subdivision and the building of a sewer on the south side of the subdivision and the selling of lots in blocks 190, 191, 194 and 195 all indicate acts of acceptance, and we think that these different things done on the subdivision by public authorities are sufficient to show acceptance of all the

streets and alleys in the subdivision before the deed of vacation was filed.

The question of whether or not the subdivider had a right to vacate the streets and alleys of a subdivision after it had sold lots according to the plat without the owners of the lots joining in the vacation, is discussed in the case of *Saunders v. City of Chicago*, 212 Ill. 211. There were three dissenting judges in this case. The court held that when the proprietor of a plat sold lots and blocks in his subdivision, he was estopped from vacating the streets and alleys in the subdivision unless all the purchasers of the lots joined in the deed of vacation. Realizing the importance of this matter, we herewith quote very extensively from that decision as follows:

“It is contended that the enactment should be construed to authorize the proprietor of a plat in which others were owners of lots, to vacate any part of the plat in which the proprietor remained the owner of all the lots. This would be to give to the proprietor of the plat the sole right to vacate and close up all streets and alleys in any part of the plat in which he owned all of the lots, without regard to the effect of such closing of the streets and alleys on the property of those who had bought lots from the proprietor in view of and on the faith of the arrangement or system of streets and alleys as set forth on the plat. The true construction recognizes the interest and right of every lot owner in the vacation of any of the streets or alleys on the plat, and requires that the vacation of a part of the plat can only be accomplished by the joint action of the proprietor and all of the owners of lots in the plat. Lots are sold by the proprietor of the plat, and bought by the purchaser, in view of the system of streets and alleys shown on the plat. The value of a lot depends not only on the fact that it abuts on a street, but also on the fact that such street connects with other streets, and such other streets with still other streets. A lot has its value, in the eyes of the proprietor as seller and an intending purchaser, in a substantial degree, on the plan and system of streets and alleys. No one would purchase a lot in a plat if the proprietor retained the right to vacate all the plat but the lot and the street in front of it. Section 1 of the Act of 1847 denies to

the proprietor the individual right to vacate the entire plat after he has sold a lot thereon, and makes it necessary to a valid vacation that all owners of lots shall join in the proposed vacation. If the owner who has sold lots may at his own pleasure select the parts of a plat in which no lots have been sold and vacate such parts of the plat, he may vacate all parts except what he had sold, and that would be to hold he possessed power to vacate the whole of the plat except the portion he had sold,—a power which Section 1 expressly denies to him. The vacation of a part of a plat must, as Section 3 declares, be under the provisions and subject to the conditions of Section 1, and, under Section 1, whenever a single lot has been sold the power of vacation no longer abides in the proprietor alone. One who purchases a lot has an interest in every part of the plat of which his lot is a part, and aside from the plain meaning of the act, it is clear it could not have been the legislative intent that the proprietor should be allowed to make a plat of his land showing thereon portions of the land set apart for the use of the purchaser of the lot and the public as public streets and alleys, and to sell lots with reference to such plat and with reference to the advantages of the streets and alleys shown on the plat for the use of the purchasers of lots and the general public, and afterwards, at solely his own pleasure and without the assent of the persons to whom he had so sold lots, vacate all parts of the plat in which he had sold no lots, together with all streets and alleys on such parts to be vacated, and thereby become the private owner of streets and alleys which he represented by his plat were to be kept open for the public use and for the convenience and benefit of the owners of the lots in the plat.”

It is true that the subdivision in question in the Saunders case came under the law of 1847 and the subdivision in this case comes under the law of 1874, but a careful examination of the laws shows that, with the exception of the changing of a few of the words, the meaning of the statute in both cases is identical. Judge Cartwright, in his dissenting opinion in the Saunders case, supra, so held.

In a very recent case entitled *Consumers Company v. City of Chicago*, 268 Ill., page 113, the question arose as to

what constitutes an acceptance. This was a case where the appellant undertook to vacate the streets and alleys in a portion of a subdivision without the owners of all the lots in the subdivision joining in the deed of vacation. It involved especially Fairfield avenue and George street, where a sewer and water main were laid in George street through the subdivision to Fairfield avenue and where a water main was laid entirely through the subdivision on Fairfield avenue,—it was a portion of Fairfield avenue and George street that the appellant undertook to vacate. The court says at page 131:

“The most serious dispute as to the facts arose over the question of the acceptance by the city of the portions of streets sought to be vacated, appellant claiming there was never any acceptance and appellee taking the position that by its undisputed acceptance of other streets in the addition and of other portions of these streets it should be held to have accepted the entire system of streets and alleys shown by the original plat, and also that it specifically recognized and accepted the particular portions of the streets in controversy, and that to thereafter allow the vacation of the premises in dispute will not only deprive the municipality of its vested rights, but will operate to deprive other property owners in the subdivision of property rights without due process of law. In the absence of a contrary intention being shown, we have held acceptance by a municipality of the principal portion or nearly all of the streets of a subdivision raises the presumption of acceptance by it of all of the streets in the subdivision. (*Kimball v. City of Chicago*, 253 Ill. 105; *Village of Lee v. Harris*, 206 *id.* 428.) Also, that evidence of the acceptance of streets by a city is found in the affirmative act of taking possession thereof for the purpose of placing therein water mains or sewers. (*City of Rock Island v. Starkey*, 189 Ill. 515; *Fairbury Agricultural Board v. Holly*, 169 *id.* 9; *Barrows v. City of Sycamore*, 150 *id.* 588.) The evidence in the case at bar shows, and the court found, that in 1893, in pursuance of an ordinance, the appellee laid a water main in North Fairfield avenue, passing under the railroad tracks, (which were not elevated until 1898), and extending some distance north and south from the tracks, and in 1895 laid another in west

George street to the center of the junction with North Fairfield avenue, which mains are still in use. The proofs also show the city, in accordance with another ordinance, laid sewers in the middle of North Fairfield avenue and in the middle of West George street to the point of intersection of the two streets. Another method of proving acceptance of streets by a municipality is to show general user thereof by the public for a considerable period of time, and such user was satisfactorily shown in the case at bar. (*Kimball v. City of Chicago supra*; *City of Rock Island v. Starkey, supra*.) We are therefore convinced that by each of the methods herein mentioned appellee accepted North Fairfield avenue and West George street, including these stub ends, and is now in possession of the stub end of North Fairfield avenue by and through the location of its water main therein.

“The proof shows the appellee has never worked or improved the stub ends in question, except as above recited, and the appellant contends that such fact contradicts any presumption of acceptance thereof. But it is said in the case of *Village of Lee v. Harris, supra*: ‘The fact that a number of the streets and alleys had never been improved by the village and had been for some years within the enclosure of private persons had no potency to defeat the action of the village. Whether the interests of the public require that a street or alley shall be improved or that repairs thereon are necessary is committed to the judgment and discretion of the governing board of the city or village. Mere adverse possession by a lot owner of a portion of a public street, however long continued, does not, by virtue of the Statute of Limitations, bar the right of the public to be restored to possession of the street to its full width.’ (*City of DeKalb v. Luney*, 193 Ill. 185.) Mere non-user of a street or alley, no matter how long continued, does not deprive the city or village, as the representative of the public, of the right to take possession thereof and improve the same.”

In view of the facts that are prominent in this case in reference to showing acts of acceptance, we are of the opinion that enough things have been done by the public, together with the selling of lots in the four blocks to show an acceptance of the streets in the entire subdivision before the

deed of vacation was filed. In fact the owners of the subdivision themselves as early as 1902 recognized that these were streets and that the City of Chicago had accepted them as streets by issuing a circular to the general public as follows:

"The property lies between the thickly inhabited district of Pullman, Roseland and Kensington in the southwest and South Chicago, the part of the whole region in the north and east. There is no doubt that the two districts will grow together over this land.

"This has not yet happened for want of sewerage, but that is now being provided. *The City Local Improvement Board has adopted a comprehensive system of sewerage and drainage for all the property north of 106th street, embracing this entire area.* The region will rapidly develop by the growth of the neighboring towns and will be a favorite field for speculation. There are good wagon roads to these lands and both the street railroads have lines near by."

Then again the Calumet & Chicago Canal & Dock Co., did not take their deed of vacation very seriously for the reason that as late as 1913, three years after their deed of vacation, they sold lots in the four blocks referred to in the subdivision. The deeds of vacation that affect this case are dated December 15, 1910, were filed for record on that date. The vacation was void for the reason that the acts of acceptance referred to in the foregoing opinion all took place before the date of the recording of the deeds of vacation.

We are, therefore, of the opinion that the deeds of vacation filed on December 15, 1910, are void and without effect (Mr. Hamlin in his opinion holds differently, but he did not have all the facts before him when he rendered his opinion) and that the Board of Local Improvements can treat these public streets as public thoroughfares and improve them accordingly, except those streets vacated by ordinance.

Very truly yours,

A. L. GETTYS,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Appointment of the Superintendent of the House of Correction.

February 17, 1916.

HON. WILLIAM HALE THOMPSON, Mayor.

Dear Sir:

The Civil Service Commission which immediately preceded the present commission classified the office of superintendent of the House of Correction, in view of which it appears to us that the power and authority of the mayor to appoint said superintendent is dependent upon said office having been erroneously included in the classified civil service; and the question at issue would appear to be, whether or not the office of superintendent of the House of Correction is the head of a principal department of the city within the meaning of the provision "heads of any principal department of the city, * * * shall not be included in such classified service" contained in Section 11 of the Civil Service Act.

The provisions of "An act to establish houses of correction, etc., in force July 1, 1871," relative to the appointment, etc., of the board of inspectors, reads in part as follows:

"Section 2. The management and direction of any house of correction * * * shall be *under* the control and authority of a board of inspectors to be appointed *for that purpose* as in this section directed. The *mayor* of said city *shall*, by virtue of his office, *be a member of said board*, who, together with three persons, to be appointed by the mayor, by and with the advice and consent of the legislative authority of said city, shall constitute the said board of inspectors. The term of office for the appointed members of said board shall be three years, but the members first appointed shall hold their office, respectively, as shall be determined by lot at the first meeting of said board, for one, two and three years from and after the first Monday in May, in the year of our Lord 1871, and thereafter one member shall be appointed each year for the full term of three years,"

“Section 17. The inspectors of any such house of correction and the *superintendent* thereof, shall, before they enter on the duties of their *respective offices*, take and subscribe the usual oath of office. Said inspectors and *superintendents* shall severally give bond to *such city* with sureties, and in a penal sum such as may be required by the legislative authority thereof, for the faithful performance of their duties.”

“Section 3. That whenever a *board of inspectors* have been organized as in section second of this act directed, they shall have power and authority to *establish and adopt rules* for the *regulation and discipline* of the said house of correction, for which they have respectively been appointed, and, *upon the nomination of the superintendent thereof*, to appoint the subordinate officers, guards and employes thereof; to fix their compensation and prescribe their duties generally; to make all such by-laws and ordinances in relation to the management and government thereof as they shall deem expedient. No appropriation of money shall be made by the said board of inspectors for any purpose other than the ordinary and necessary expenses and repairs of said institution, except with the sanction of the legislative authority of said city.”

“Section 4. Said inspectors shall serve without fee or compensation. There shall be a meeting of the *entire board*, at the house of correction, *once in every three months*, when they shall fully *examine into its management* in every department, hear and determine all complaints or questions not within the province of the superintendent to determine, and *make such further rules and regulations* for the good government of said house of correction as to them shall seem proper and necessary. One of said appointed inspectors shall visit the said house of correction once, at least, in each month.”

In determining the question at issue, it might be material thereto to take into consideration the following propositions:

The mayor is a member of said board:

Said board is appointed, not for the purpose of managing said institution, but to authorize and control the manner in which the same shall be managed.

Such authority as may be conferred by the statutes, is

conferred upon the board, so organized, and not upon the members thereof as individuals.

The power and authority so conferred is of a quasi-legislative character in that said board must exercise its control and authority over said institution by means of rules, by-laws and ordinances in relation to the management and government thereof, and not by the individual, personal and physical acts of the several members thereof, except as the title of the board would suggest, such incidental and necessary inspection of said institution by the several members of said board, as would ordinarily be required of the members of any board of like character, in order that said board might intelligently determine the requirements and needs of said institution.

The power of appointment, and as hereinafter set forth, the removal of the employes of said institution, is conferred upon the superintendent thereof subject to the approval and rules of said board.

The members of said board shall serve without fee or compensation.

That nothing contained in said act, would indicate that the powers and duties of said board were other than the inspection and regulation of some other individual, personal and physical management of said institution.

Section 7 of said act, which provides for the appointment and duties of the superintendent of said house of correction, reads in part as follows:

"The superintendent of the said house of correction shall have entire control and management of all its concerns, subject to the authority established by law, and the rules and regulations adopted for its government. It shall be his duty to obey and carry out all written orders and instructions of the inspectors not inconsistent with the laws, rules and regulations relating to the government of said institution. He shall be appointed by the mayor by and with the consent of said board of inspectors, and shall hold his office for four years and until his successor shall have been duly appointed and qualified, but he may be removed by the inspectors at any time, when in their judgment it shall be advisable. He

shall be responsible for the manner in which said house of correction is *managed and conducted*. He shall reside at said house of correction, *devote all his time and attention* to the business thereof, and visit and examine into the condition and management of every department thereof and of each prisoner therein confined, daily. *He shall exercise a general supervision* and direction in regard to the discipline, police and business of said house of correction. * * *''

While, seemingly, the provisions contained in Sections 6 and 12 of said act have been abrogated to some extent by the provisions contained in the Civil Service Act, the following excerpts from said sections should be taken into consideration along with and collateral to the provisions contained in Section 7 in determining the question at issue:

"Section 6. * * * any subordinate officer or employe may be removed by the superintendent at his discretion, but immediately upon the removal of such officer or employe, he shall report to said board the name of the person removed, and the cause of such removal."

"Section 12. * * * The superintendent of said house of correction shall appoint, by and with the advice of the board of inspectors, a matron and other teachers and employes for the said house of shelter. * * *"

In reference to the powers and duties of the superintendent, it is well to note that while the express powers and duties, hereinafter set forth, may not be conclusive with respect to the matter in question they do not appear to conflict in any way with the remaining provisions of said act.

"The superintendent of said house of correction shall have *entire control and management* of all its concerns, *subject to the authority established by law*, and the *rules and regulations* adopted for its government.

"He shall be *responsible* for the manner in which said house of correction is *managed and conducted*."

The authority conferred upon said superintendent under the ordinances of the city, is contained in Section 1495 of The Chicago Code of 1911, which reads as follows:

“1495. SUPERINTENDENT—AUTHORITY.) The superintendent of the house of correction shall have the custody, rule, charge and keeping of the house of correction, and of all persons committed thereto, under the supervision and direction of the board of inspectors; and he shall enforce such order and discipline as shall be directed by such board.”

A satisfactory and conclusive determination of the question at issue, must necessarily require that the provisions of said act and the foregoing section of the city ordinances, relative to the powers and duties of the superintendent, must be considered in connection with those pertaining to the powers and duties of the board of inspectors.

From the foregoing it would appear, except in so far as the several members of said board are required to make occasional visits to the institution for the purpose of inspecting the same, as heretofore mentioned, that the powers and duties relative to said board were conferred upon the same as a legal entity and not upon the several members thereof as a group of individuals, and by reason of the character and nature of the powers so conferred, the functions of said board are of a quasi-legislative and governmental character rather than such as would tend to make said board the head of a principal department of the city within the meaning of the provisions contained in Section 11 of the Civil Service Act, which reads as follows:

“Section 11. OFFICERS EXCEPTED FROM CLASSIFIED SERVICE. Officers who are elected by the people, or who are elected by the city council pursuant to the city charter, or whose appointment is subject to confirmation by the city council, judges and clerks of election, *members of any board of education, the superintendent and teachers of schools, heads of any principal department of the city*, members of the law department, and one private secretary of the mayor, shall not be included in such classified service.”

In view of the express language employed in the foregoing section and the further fact that the office of “superintendent of schools” is specifically mentioned therein, it appears to us that the Legislature intended to distinguish between a “board” (the functions of which are governmental

in character) and the "head of a principal department of the city," and the incorporation therein of the office of "superintendent of schools" was for the purpose of removing the possibility of a controversy arising as to whether or not said office was the "head of a principal department of the city," within the meaning of the provisions of said section.

We have carefully investigated the manner in which past appointments have been made to the office of superintendent of the house of correction; and incidental thereto, we have examined the printed annual reports of said board of inspectors, among which, relative to said appointment, we find the first report for the years 1872 and 1873 contains the following:

"Mr. Charles E. Felton having been appointed by this board as superintendent of the house of correction, took charge of its affairs on the 15th day of January, 1872."

The 36th report, for the year 1907, makes mention of the same as follows:

"June 1, 1907, Mr. A. M. Lynch, superintendent, resigned and his Honor Mayor Busse, appointed Mr. John L. Whitman in his place, and his appointment was confirmed by your board."

As a result of said investigation, we find that said office, from its inception up to the present time, has been filled by appointment thereto by the mayor, by and with the consent of said board of inspectors.

In view of the foregoing and by reason of the distinction between the character and nature of the powers and duties expressly conferred upon said superintendent and those conferred upon the board, we must conclude that the superintendent of the house of correction is the head of a principal department of the city within the meaning of the provisions contained in Section 11 of the Civil Service Act, and by reason of the exceptions mentioned in said section the office of said superintendent is not included in the classified service.

As to the appointment and removal of said superintendent, the statutory provisions governing the same provide

in substance: He shall be appointed by the mayor by and with the consent of said board of inspectors, the appointment should be for four years and until the successor shall have been duly appointed and qualified, and before he enters upon the duties of said office, he shall take and subscribe to the usual oath of office, and, as provided in Section 1496 of The Chicago Code of 1911, execute a bond to the city in the sum of \$5,000 with such sureties as the City Council shall approve.

He may be removed by said board of inspectors at any time, when in their judgment it shall be advisable, but whereas it appears that the present incumbent, Mr. John L. Whitman, was appointed to said office on June 1, 1907, and the act provides he "shall hold his office for four years and until his successor shall have been duly appointed and qualified," we must conclude that his incumbency of said office would terminate upon the appointment and qualification of his successor.

Yours very truly,

HERVEY C. FOSTER,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Right of the City to Make Garbage Contract in Advance of Appropriation.

February 18, 1916.

HON. W. R. MOORHOUSE, Commissioner of Public Works.

Dear Sir:

In response to your verbal request for an opinion as to the right of the city to enter into a contract for the disposition of garbage in advance of the passage of the appropriation to pay for such work, we respectfully submit the following:

"An act to authorize cities of a certain class to make contracts for a period exceeding one year, relating to the collection and final disposition of garbage" (approved and in force March 30, 1897), is as follows:

"IN CITIES HAVING MORE THAN 100,000 INHABITANTS —NOT EXCEEDING FIVE YEARS.) Section 1. *Be it enacted by the people of the State of Illinois represented in the General Assembly:* That any city having a population of more than one hundred thousand inhabitants, as shown by any school census or by the Federal census, shall be and hereby is authorized and empowered to make contracts for more than one year and not exceeding five years, relating to the collection and final disposition of garbage and ashes.

"CITY COUNCIL TO MAKE ANNUAL APPROPRIATION.) Section 2. Whenever any city shall make any such contract as is authorized by this act, it shall be and is hereby made the duty of the city council of such city to include in the annual appropriation ordinance of each current fiscal year, an appropriation of a sum of money, sufficient to pay the amount, which under and by the terms of any such contract, shall become due and payable during such current fiscal year."

Under the ruling of the corporation counsel's office, it has been held that all contracts relating to the collection and final disposition of garbage may be made before any appropriation for same is passed by the City Council. We refer you to the following language of an opinion rendered to the Committee on Finance under date of January 22, 1913, and found in bound volume of opinions from January 1, 1913, to October 5, 1914, at page 44:

"We read the act in question to mean that all contracts in relation to the collection and final disposition of garbage may be made before any appropriation for same is passed by the City Council. A reasonable interpretation of Section 2 of this act, which makes it the duty of the City Council to include in the annual appropriation ordinance of each current fiscal year, an appropriation of a sufficient sum of money to pay the amount which will become due during the current fiscal year whenever the city makes a contract in accordance with the provisions of this statute, would seem to be

that such a contract may be entered into without a prior appropriation being made, but that after the contract is made the city is bound each year to make appropriation for the expense. In this respect it is a complete departure from the ordinary method of procedure requiring an appropriation before a contract can be let. It is clear from the wording that this was the intention, otherwise there would be no occasion for the special act.

“While there is no authority to which we can point to support our views on the above three questions, we believe the language of the statute is sufficiently plain and that there can be no mistake as to same.”

The provision of the City Code prohibiting the making of contracts in the last month of the fiscal year without express authority of the City Council has, in our opinion, no application to a contract of this nature, made by the express authority of the statute in question.

We have given careful consideration to this matter and see no reason to depart from the opinion previously rendered by this office.

Very truly yours,

EDWARD H. WRIGHT,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

**Reimbursement of Police Officer for Payment of Judgment
Recovered against Him for False Arrest.**

February 19, 1916.

HON. CHARLES C. HEALEY, General Superintendent of Police,
Chicago, Illinois.

Dear Sir:

I have carefully examined the correspondence, affidavits, etc., relative to the subject matter referred to in the heading of this communication.

It appears that Officer Stapleton, in the performance of his duty as a police officer, on the 22nd day of April, 1913, arrested one Spencer Kittoe. Upon hearing before Municipal Court Judge Gemmill, Kittoe was discharged. He afterwards brought suit against Officer Stapleton for false arrest, and upon hearing on February 17, 1914, judgment for \$50 and costs in the sum of \$17 (amounting to a total of \$67) was rendered against Officer Stapleton. On April 22, 1914, Officer Stapleton satisfied the judgment and later filed a claim with the Finance Committee for reimbursement of the amount of the judgment and costs.

From the correspondence of the various commanding officers, including the chief, it appears they were all of the opinion that Officer Stapleton acted properly in making the arrest.

The question presented for our consideration is, whether or not the City of Chicago can legally reimburse Officer Stapleton.

Section 62 of Clause II of the Cities and Villages Act provides:

“To appropriate money for corporate purposes only, and provide for payment of debts and expenses of the corporation.”

This clause places a limitation upon the powers of the City Council, in effect prohibiting appropriations for any other than corporate purposes.

The leading case in this state on the subject of the city's power to appropriate money other than for corporate purposes is the case of *Washingtonian Home v. City of Chicago*, 157 Ill. 414. In passing on this subject, the court, at page 428, said:

“The revenues of the City of Chicago arising from licenses, from taxation, and from all other sources, are owned by the city and held by it in trust, to be used for corporate purposes which are lawful, and the revenues of a city cannot be diverted to any other purpose. The revenues of a city cannot be donated by the officers of the city, or by the City Council, to any person they may think entitled to the same, but, on the other hand,

such revenues can only be paid out or appropriated by the City Council or its officers in the manner and for the purposes authorized by law."

While it is well established that any appropriation of municipal funds which partakes of the nature of a donation is illegal, this rule of law is not intended to prevent an appropriation by the City Council with a view to meeting a just or moral obligation arising out of services rendered or work done on behalf of the city and the benefits of which the city has received.

In considering this phase of the city's moral obligation to appropriate money to compensate a school supervisor for services rendered while her title to the position was in doubt and no compensation was received, the court in *Bailey v. Philadelphia*, 167 Pa. State, 569, at page 572 said:

"Councils, it is true, are trustees, and the law limits their expenditure of public money to public purposes, but they are also representatives of their constituents and delegates of the city's legislative powers, and there is nothing in the law or in sound public policy to prohibit the city from being honest, and paying its *bona fide* debts which are good in conscience and in justice, though for sufficient other reasons, there is a general rule which prevents them from being enforceable by law."

In the case of *State v. St. Louis*, 174 Mo. 125, where an ordinance was passed to reimburse a police officer for judgment which was rendered against him for an injury unintentionally inflicted upon a bystander when in the course of his official duty he was endeavoring to kill a mad steer which was endangering the lives of the public, the court in passing upon the question as to whether or not the City Council had the legal right to pass such an ordinance, at p. 148 said:

"An act or ordinance appropriating money to pay such expenses would not be a donation of public money to an individual."

McQuillin on Mun. Corp., Vol. V, Section 2168, states the rule as follows:

“While payment of claims which are neither legal nor equitable is an expenditure for other than public purposes, yet the payment by municipal corporations of claims founded in justice and supported by a moral obligation does not conflict with constitutional provisions forbidding the making of gifts.”

In view of the fact that Officer Stapleton, as stated by the commanding officer whose letters are a part of the correspondence in this matter, was properly in the exercise of his rights and authority, we are of the opinion that the city is morally obligated to reimburse Officer Stapleton for money expended in satisfying the judgment in question.

If there is any available fund out of which reimbursement can be made, we recommend that the sum of \$67, the amount of the judgment and costs, be paid to Officer Stapleton.

Respectfully submitted,
LOUIS B. ANDERSON,
Assistant Corporation Counsel.

Approved:
SAMUEL A. ETTELSON,
Corporation Counsel.

**Legality of Charging the Expenses of the Transportation
Bureau of the Department of Public Service
to the Traction Fund.**

February 19, 1916.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

We have your letter dated February 18th in which you request an opinion as to the legality of charging the expenses of the Transportation Bureau of the Department of Public Service to the traction fund.

The provision of the traction ordinances upon which a determination in reference to the question suggested must be based are as follows:

“After the deduction from the gross receipts of the items hereinbefore in this section provided, the amount remaining shall be considered as the net receipts for such year arising from the operation of the street railway system hereby authorized, and shall be divided between the company and the said city in the following proportions: Forty-five (45) per cent to be retained by the company, and fifty-five (55) per cent to be paid forthwith by the company to the said city, * * *.”

“It is further provided that, subject to the action of the City Council of said city, the said city shall deposit the amount so paid to the said city to the credit of a separate fund to be kept and used for the purchase and construction of street railways by said city; but any failure to comply with this provision shall in no way affect the rights or obligations of the company under this ordinance.”

It will be seen that the traction fund is intended to be used for the purchase and construction of street railways by the city. It has been held by the Supreme Court in the case of *Barsaloux v. City of Chicago*, 245 Ill. 598, 611, that under these ordinances “clearly the city would have no power to divert this fund to general corporate purposes,” but that it had the right to use the fund for the purpose of meeting the cost of an investigation into the desirability of constructing subways, since the power to construct same, resulting from the power to construct street railways, necessarily included the power to take preliminary steps for the purpose of preparing plans and specifications.

We are of the opinion that the Bureau of Local Transportation of the Department of Public Service has no powers which can be said in any way to be connected with the purchase or construction of street railways.

The duties of this bureau, as we understand them, consist of the checking up and investigation of the operation of the street car lines and relate merely to the service rendered by the local transportation companies.

We are, therefore, of the opinion that the traction fund

may not be used for the purpose of meeting the expenses of the bureau in question.

Very truly yours,
RALPH G. CRANDALL,
Assistant Corporation Counsel.

Approved:
SAMUEL A. ETTELSON,
Corporation Counsel.

Application of Nellie Driscoll for a Pension.

February 22, 1916.

BOARD OF TRUSTEES OF THE POLICE PENSION FUND OF THE
CITY OF CHICAGO.

Gentlemen:

The application of the above named claimant for a pension has been acted upon favorably by your board at the last meeting.

As requested by you, I have examined all the papers filed with the said application and learn that the husband of the applicant lacked a short time of completing the ten years of service required under Section 5 of the Police Pension Fund Act. From this examination, it appears that the death of the husband of the applicant was the direct result of his contracting the ailment in the performance of police duty.

From the report of his commanding officer, he was on actual duty on the 12th day of December, 1915, and went out on his post where he remained for some hours and reported to his station that he was suffering from chills contracted by him while travelling beat that evening. He returned to his home and died after an illness of seven days.

In view of all the facts and circumstances surrounding this case, I feel justified in advising your board that a liberal construction of Section 5 of the Police Pension Fund Act brings this application within the purview of same, and it is within the discretion of your board when consider-

ing applications for pensions to determine under what particular section you grant pensions.

Had this officer not reported for duty on the 12th day of December, he might be alive today, and having reported for duty and being in the actual performance of police duty when he was stricken with the ailment which resulted in his death a few days later, I am compelled to advise you that your board acted legally and properly in granting a pension to the applicant herein. I therefore concur in your finding and recommend that the applicant be paid a pension.

Yours very truly,

JAMES W. BREEN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Watchmen at Illinois Central Railway Co. Crossings.

February 23, 1916.

HON. WM. HALE THOMPSON, Mayor.

Dear Sir:

The corporation counsel is in receipt of a communication from your secretary requesting an opinion as to the right of the city to compel the Illinois Central Railway Company to maintain watchmen at twelve of their crossings located between 69th and 83rd streets on their branch which goes to South Chicago. The same has been referred to the undersigned for attention.

We desire to state, at the outset, that there have been a great many opinions written by this department relative to the matter of watchmen at crossings of the various railroads, and we will incorporate in this communication excerpts from the various opinions, written in this behalf. The ordinance on this subject is Section 2195 of The Chicago Code of 1911, which provides:

“2195. FLAGMEN AT CROSSINGS.) Every person or corporation owning or operating a steam railway whose

track or tracks cross or intersect at the street level any street car track or tracks, or any street or highway within the City of Chicago, shall, in addition to the flagmen now stationed, kept and maintained at such crossings or street intersections, station, keep and maintain flagmen whose duty it shall be to signal all persons of the approach of any engine or car or train of cars, and to warn them of any existing or impending danger, at such other crossings and at such hours as the City Council may from time to time prescribe.

“Nothing herein contained shall be construed so as to relieve or release any such person or corporation from stationing, keeping and maintaining flagmen at all crossings where such flagmen are at the time of the passage of this ordinance stationed, kept and maintained.”

On May 16, 1912, Charles M. Haft, assistant corporation counsel, in a communication approved by the corporation counsel, advised Hon. James Donahoe, chairman of the Council Committee on Judiciary in the following language, relative to the above ordinance:

“We beg to advise you that it would best serve the convenience of the railroad companies if the Council were to pass an order pursuant to the terms of Section 2195 of The Chicago Code of 1911 directing certain railroad companies to station flagmen at certain crossings. This method of procedure, however, could not legally be enforced if the railroad companies were to resist its enforcement.

“The only method of procedure, which would not be vulnerable to attack, would be to amend the section in question making it general in its application to all railroads and all crossings. This would probably impose upon the railroad companies some expense in maintaining flagmen at crossings that would not be necessary, and in view of this act it would seem to us that the exercise of a little judgment on the part of the railroad companies would dictate to them the concurrence in the method first suggested.

“Will your committee indicate to us which plan they desire, under the circumstances, to pursue?”

In a later communication to Hon. James Donahoe, under date of July 22, 1912, Mr. Leon Hornstein, assistant

corporation counsel, submitted to the Judiciary Committee an order drawn in conformity with the terms of Section 2195 of The Chicago Code; it was passed by the City Council and appears in the Council Proceedings of July 22, 1912, at pages 1650-1655, which is in part as follows:

“ORDERED. That all persons, firms and corporations operating steam railways, whose track or tracks cross or intersect streets at the grade crossings enumerated herein, shall station, keep and maintain at all hours of the day and night at such crossings or street intersections, flagmen whose duty it shall be to signal all persons of the approach of any engine or car or train of cars, and to warn them of any existing or impending danger in accordance with the provisions of Section 2195 of The Chicago Code of 1911, but nothing herein shall be construed as in any way repealing, altering or modifying said Section 2195.

“The crossings and intersections at which flagmen are to be so stationed, kept and maintained are as follows: * * *.”

The order then specifies a long list of railroads and designates their grade crossings.

On June 9, 1913, in an opinion addressed to Hon. Eugene Block, chairman of the Committee on Local Transportation, written by Max M. Korshak, assistant corporation counsel, and approved by John W. Beckwith, acting corporation counsel (being in answer to a request from Chairman Block to redraft Section 2195 of The Chicago Code), this language was used:

“Section 2195, as the same now appears in the code is ambiguous, and it is exceedingly questionable whether a prosecution can be maintained thereunder without additional legislation by the City Council, since the ordinance provides that the flagmen are to be stationed ‘at such periods as the City Council may from time to time prescribe.’

“There is more or less difficulty in fixing a period during which flagmen should be maintained, because of widely varying conditions throughout the city. What might be a proper period near the center of the city where traffic is congested, might be improper and un-

reasonable at Ninety-fifth street, where the population is sparse, and the traffic insignificant.

"The draft of the ordinance we have prepared for your consideration seeks to remedy this by providing an arrangement of zones to be established within certain radii of the City Hall. As you will observe, the number of zones to be established as well as the periods of time during which flagmen are to be maintained in the zones should be investigated and determined by your committee."

The City Council did not pass the proposed amendment referred to, which was as follows:

"BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF CHICAGO:

"Section 1. That Section 2195 of The Chicago Code of 1911 be and the same is hereby amended so as to read as follows:

'2195. FLAGMEN AT CROSSINGS.) Every person, firm, or corporation owning or operating a steam railway whose track or tracks cross or intersect at the street level any street car track or tracks of any street railway line or any street or highway within the city shall station, keep and maintain within zones hereinafter provided, flagmen whose duty it shall be to signal all persons of the approach of any engine or car or train of cars and to warn such persons of any existing or impending danger.

Zone One (1) shall include the territory within a radius of miles of the building commonly known as the City Hall. .

Zone Two (2) shall include the territory excluding Zone one (1) within a radius of miles of the building commonly known as the City Hall.

Zone Three (3) shall include the territory excluding Zone One (1) and Zone Two (2) aforesaid within a radius of miles of the building commonly known as the City Hall.

Flagmen shall be maintained within Zone One (1) between the hours of and

Flagmen shall be maintained within Zone Two (2) between the hours of and

Flagmen shall be maintained within Zone Three (3) between the hours of and

Section 2. This ordinance shall be in full force

and effect from and after its passage and due publication.' ”

Subsequently, under date of October 2, 1913, Chairman Block was again in receipt of an opinion in regard to certain crossings of the Chicago & Western Indiana Railroad written by Mr. Nicholas Michels, assistant corporation counsel, and approved by the corporation counsel, in which the following was said :

“In answer to your letter of the 29th ult., with reference to the failure of the Chicago and Western Indiana Railroad Company to establish safety gates and maintain flagmen at certain crossings, although required so to do by the order of the City Council passed July 22, 1912, I will say that the attention of the law department of the railroad has been called to these facts and the promise made that an answer will be delivered within a few days.

“Unless some effort is made to comply with the order of July 22, 1912, I shall be at your service to assist in compelling obedience to the laws and ordinances governing the subject.”

The matter is discussed, quite at length, in an opinion of Mr. Leon Hornstein, under date of January 5, 1914, and approved by William H. Sexton, the corporation counsel, in answer to an inquiry of the mayor, in which, after summarizing the various opinions on the subject, he said :

“On the question of the enforceability of this order, the original opinion mentioned above was based on a well established principle of law to the effect that the legislative authority cannot single out certain persons or things and enact a law as to them. In other words, an ordinance, to be effective, must be a general ordinance.”

“It was held in *Cicero Lumber Company v. Town of Cicero*, 176 Ill. 9, that an ordinance creating a pleasure driveway under the act of 1889, which forbids the use of heavy vehicles thereupon except ‘upon special permission’ of the Board of Trustees, without prescribing any general conditions upon which such permission shall be granted, is unreasonable and invalid, as vesting the board with arbitrary power.

“This principle is not a new one and has since been reaffirmed in numerous cases, among them being:

Noel v. The People, 187 Ill. 587.

Meyer v. City of Decatur, 143 Ill. App. 103.

“Since the law will not permit the City Council to act in such case otherwise than by general ordinance, there seems to be no way of compelling the railroad companies to station flagmen at the crossings in question except by the enactment of a general ordinance requiring flagmen at all grade crossings. The only limitation on this that we could suggest would be that a zone might be established including all the thickly populated parts of the city within which such a general ordinance would be applicable. This, under the authority of the *City v. Gunning*, 214 Ill. 628, would be valid.”

The situation was again treated in a communication to the Hon. L. E. McGann, Commissioner of Public Works, under date of January 8, 1914, by Assistant Corporation Counsel Haft, of this department, in which he advised the commissioner that the order of the Council of July 22, 1912, heretofore referred to, was not enforceable.

From the foregoing opinions it will be seen that this department has at all times held that the order of the City Council was a nullity and the holding imparted to the Council committees and the department heads interested, as well as the mayor, and as far as we can ascertain no steps have ever really been taken to safeguard the lives of the public at these crossings. While we are of the opinion that the foregoing interpretation of the law is a correct one, that is that the order of July 22, 1912, cannot be enforced, we believe in view of the seriousness of the situation that it would not be amiss to have the city prosecutor start suits against the offending companies under Section 2195. In case the city should succeed in maintaining the issues, the penalty would be a fine of not less than twenty-five (\$25.00) dollars nor more than two hundred (\$200) dollars for every violation, the same to be fixed by Section 2201 of the Code.

We have today written the Illinois Central Railway Company relative to protecting the particular crossings re-

ferred to in your letter, a copy of our letter to them being herewith enclosed.

Respectfully submitted,
W. H. DEVENISH,
Assistant Corporation Counsel.

Approved:
SAMUEL A. ETTELSON,
Corporation Counsel.

Installation of Moving Picture Machine in Club House.

February 23, 1916.

HON. WM. G. KEITH, Commissioner of Gas and Electricity.

Dear Sir:

We are in receipt of your communication of February 18, 1916, forwarding a copy of a communication sent to you by W. R. Woolrich, asking for permission to install a moving picture machine in the building belonging to the International Harvester Company located at 1734 Fullerton avenue, together with your request for an opinion as to whether or not the building referred to by Mr. Woolrich may be classed as a school within the meaning of the ordinance passed on January 24, 1916.

Section 1 of an ordinance passed by the City Council on the 24th day of January, 1916, provides as follows:

“Section 1. That motion picture machines constructed in accordance with the specifications herein set forth and tested and approved by the commissioner of gas and electricity may be operated without an enclosing fireproof booth in the places and under the conditions herein named, subject to the limitations and restrictions fixed by this ordinance; Provided, however, that nothing in this ordinance shall be construed as affecting the present ordinances governing the construction or occupation of buildings. Such motion picture machines may be used in churches for religious and educational purposes and in school houses for educational purposes; but nothing herein contained shall be understood as modifying or altering the requirements for or restrictions on the use

of motion picture machines operated in places of amusement where an amusement license is required by the ordinances of the City of Chicago."

In his communication to you Mr. Woolrich states, in part, as follows:

"We herewith present our request to use a moving picture machine in the auditorium of our club house as per instructions of the recent ordinance giving such privilege to churches and schools.

"Our building is located at 1734 Fullerton avenue on the second and third floors. On the second floor are three bowling alleys, three billard tables, a ladies' rest room, a library (branch of the Chicago Public Library) and a class room. On the third floor is an auditorium and lecture room with regulation fire exits, etc.

"Throughout the week the class room and auditorium are used for classes, lectures, etc. Our school has an enrollment of 70 day students and 10 evening students and sessions are held every day of the week. We give a four-year course of technical subjects.

"We are members of the National Association of Corporation Schools.

"In addition to this we carry on periodically in our auditorium, classes of instruction for foreigners and at seasons of the year have Safety First lectures for the employes.

"Other lectures are held throughout the year under the supervision of the Harvester Extension Bureau for the benefit of our employes."

You will observe that Section 1 of the ordinance of January 24, 1916, limits the places in which motion picture machines may be constructed and operated without any inclosing fireproof booth to churches and schoolhouses.

The construction of buildings to be used as churches and schoolhouses is regulated by The Chicago Code of 1911. Schoolhouses are placed in what is known as "Class VIII" under Article IX, the provisions of which regulate their construction in accordance with the seating capacity and the number of pupils in attendance.

From the communication received by you from the party requesting permission to install a motion picture machine, it

appears that the building in question is used as a clubhouse and that they are using only the second and third floors of the same; that there are three bowling alleys, three billiard tables, a ladies' rest room, a library and a class room on the second floor, and an auditorium and lecture room on the third floor; that throughout the week the class room and auditorium are used for classes, lectures, etc.; that the school has an enrollment of 70 day students and 10 evening students, and that sessions are held every day of the week.

We have given your communication careful consideration, and are of the opinion that it was the intention of the City Council, when it passed the ordinance above referred to, to permit the construction and operation of motion picture machines in buildings used exclusively for religious and educational purposes.

While there appears to be no universal rule defining the word "schoolhouse," from an examination of all the authorities we have reached the conclusion that a schoolhouse should be defined to be a building used exclusively for educational purposes.

We do not believe that a clubhouse wherein bowling alleys, billiard rooms and rest rooms are located which may happen to have a small class room and auditorium where lectures are given can be construed to mean a schoolhouse within the meaning of the ordinance of January 24, 1916.

We, therefore, recommend that you decline to permit the construction and operation of a motion picture machine in the building located at 1734 Fullerton avenue.

Very truly yours,

JAMES W. BREEN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

**Lawfulness of Advertising Plan of Great Western Sales
Agency.**

February 23, 1916.

HON. CHARLES C. HEALEY, General Superintendent of Police.

Dear Sir:

We have your letter dated February 14th in which you request an opinion as to whether or not the advertising plan of the Great Western Sales Agency, which is described therein, is lawful.

From the information contained in your letter and its enclosures it appears that the plan in question involves the following features:

A coupon is given to each person entering the theater which reads as follows:

"GREAT WESTERN SALES AGENCY

F. W. CURTIS, Prop.

Write Name and Address Plainly and Deposit in Box
on Leaving Theater.

Name
Address
Telephone No.

A slide is used in the course of the performance which reads as follows:

"TONIGHT

We are distributing a number of bungalow lots in
Ravinia Park at a nominal cost for advertising pur-
poses. Sign your name and address on your coupon and
drop it in the box on leaving theater. You will be noti-
fied and given full information regarding lot by Great
Western Sales Agency."

and those who write their name and address on a coupon and deposit same in a box at the door are forwarded a contract which provides as follows:

"Kindly reserve for me (.....) lots, being
lots block plat
at Ravinia Park, Muskegon County, Michigan, for which
I promise to pay \$. Herewith
\$. and balance in sums of \$.
each, payable on the day of each

hereafter until the full amount of \$.....
 is paid. It is understood that deed for lot
 shall be issued to me when I have made all payments
 agreed above. If there is any default in payments, for
 these lots mentioned above, it is agreed that
 all moneys paid shall be forfeited as liquidated damages.

Signature

Address

Great Western
 Sales Agency.

By Salesman. At.....

.....

This contract is a receipt for \$...... cash
 payment on lot as
 above described."

You state that the cost of these lots, including cost of recording, is \$9.80 cash or \$11.80 in installment payments.

We are of the opinion that the general features of the plan of advertising above set forth are in no sense unlawful. If the plan forms a part of a scheme which has for its purpose the defrauding of the public it would of course be objectionable and should not be permitted. If, however, a good title is given to the purchaser and the sale of the lots appears to be a perfectly legitimate transaction there would seem to be nothing in the plan itself which would render it objectionable. No representations are apparently made for the purpose of inducing the belief that the lots are given away or that there is any drawing or distribution of the lots by chance. There is therefore no lottery and the statements made are not such as to give the impression that the lots may be obtained otherwise than by purchase. This impression is strengthened by the wording of the contract.

The only statement made which appears to be at all objectionable, is the one shown on the slide to the effect that the lots are "distributed" at a nominal cost "for advertising purposes." We understand that the lots are in fact sold for profit, and the presumption is therefore that this "nominal cost" represents the real value of the lots.

The statement in question has the effect of representing that the lots are specially offered at an unusually low or

“nominal” cost, “for advertising purposes.” Considerable latitude is given to vendors in making statements as to the value or selling price of property offered for sale. If, however, the statement in question is untrue, as seems to be the case, it has a tendency to mislead, and we are not willing to make a favorable recommendation in regard to its use in connection with the advertising scheme in question. It is within the power of the city to exercise supervision over matters brought before the public in moving picture houses and theaters, and we suggest therefore, that the words “distributing” and “for advertising purposes,” in view of their misleading character, be eliminated from the slides used.

We return the slides herewith.

Very truly yours,

RALPH G. CRANDALL,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Pollution of River by Trade Wastes, etc.

February 26, 1916.

HON. WM. J. HEALY, Chairman, Commission on Downtown
Municipal Improvements.

Dear Sir:

In your letter of February 18th you call our attention to the fact that The Sanitary District of Chicago has recently authorized the construction of intercepting sewers in the City of Evanston with the intent to divert the sewage of this city into the north shore channel. You also call our attention to the fact that the sewage of Wilmette, Glencoe and other north shore towns has already been diverted into the north shore channel. You then ask the following questions:

What are the rights of the City of Chicago to prevent the pollution of the Chicago river by trade wastes, sewage or other matters?

In answering this question, it is necessary to take into consideration the fact that prior to 1889 the sewage condition in and about the City of Chicago and particularly in the Chicago river had become very detrimental to the health of the city and that after numerous investigations by various organizations an act was presented to the Legislature of Illinois creating The Sanitary District of Chicago which act was adopted by the Legislature and approved by the governor May 29, 1889. Section 7 of said act provides as follows:

“Sec. 7. BOARD OF TRUSTEES—POWERS OF.) § 7. The Board of Trustees of any sanitary district organized under this act shall have power to provide for the drainage of such district by laying out, establishing, constructing and maintaining one or more main channels, drains, ditches and outlets for carrying off and disposing of the drainage (including the sewage), of such district, together with such adjuncts and additions thereto as may be necessary or proper to cause such channels or outlets to accomplish the end for which they are designed in a satisfactory manner; * * *.”

Under Clause 38 of Section 1 of Article V of the Cities and Villages Act, the City Council is authorized to make regulations in regard to the use of harbors—under Clause 40 to provide for the cleansing and purification of waters, water courses and canals. Pursuant to the Sanitary District Act, the Sanitary District has constructed the channel connecting the south branch of the Chicago river with the Desplaines river at Lockport, Illinois, and, by turning waters from Lake Michigan to the Chicago river and this channel, has cleaned out the south branch of the Chicago river and produced healthy conditions where disease and pestilence prevailed prior to the enactment of the act in question.

The Sanitary District of Chicago is a municipal corporation organized and existing and covering the defined territory including the City of Chicago as a part of that territory and including the portion of Cook County which fronts on the Lake Michigan shore as far north as the county line of Cook County including the City of Evanston and the Villages of Kenilworth and Winnetka. The purpose of the Sanitary Dis-

trict was as set out in Section 7 above quoted. In 1903 the Legislature of Illinois passed an act extending the boundary of the Sanitary District so as to cover the north shore town in question and that act provided that:

“The Board of Trustees of said Sanitary District shall have the right to provide for the drainage of the additional territory added to said Sanitary District by this act by laying out, establishing, constructing and maintaining one or more channels, drains, ditches and outlets for carrying off and disposing of the drainage (including the sewage) of such district, together with such adjuncts and additions thereto as may be necessary or proper to cause such channels or outlets to accomplish the end for which they are designed in a satisfactory manner * * * and shall maintain the same proportion of dilution of sewage through such auxiliary channels as it may construct and join to its main channel as is now required by the act creating said Sanitary District; * * *.”

The purpose of the Wilmette channel connecting the north branch of the Chicago River with Lake Michigan was to divert the sewage from those north towns from polluting Lake Michigan (and thereby contaminating the water supply of the City of Chicago) and turn it into the Chicago river and thence into the Sanitary District channel. The question arose as to the right of the Sanitary District to construct the intercepting sewer in Evanston. The Supreme Court held that the Sanitary District was authorized to construct this intercepting sewer. In the case of *Judge v. Bergman*, 258 Ill. 246, the court, at page 255, said:

“The north shore channel is designed to convey the sewage from Evanston and other municipalities to the main channel. It cannot be made to serve its purpose until it is connected with the sewerage systems of the several municipalities intended to be served by it. Unless the Sanitary District is authorized, under the law, to construct such adjuncts and additions as are proper and necessary to reach the sewerage systems of these several municipalities, the north shore channel will be practically worthless. If it were sought to compel the City of Evanston to construct these conduits and install the pumping station, its all-sufficient answer undoubtedly would be

that the city had a complete and satisfactory system of sewerage and it was therefore unnecessary for the proper drainage of the city to construct said improvement.”

It is unnecessary to state to you that the constitutionality of the Sanitary District Act has been passed upon and upheld by the Supreme Court of our State in several well-considered cases, so that there can be no dispute as to the right of the Sanitary District to make use of the Chicago River and its branches and the said north shore channel for the purpose of conveying sewage.

In Section 23 of the original Sanitary District Act the following provision occurs:

“If the population of the district draining into such channel shall at any time exceed 1,500,000 such channel shall be made and kept of such size and in such condition that it will produce and maintain at all times a continuous flow of not less than 20,000 cubic feet of water per minute for each 100,000 of the population of such district, at a current of not more than three miles per hour, * * *

and in Section 2 of the Act of 1903 amending said Sanitary District Act the provision is that the district shall maintain:

“The same proportion of dilution of sewage through such auxiliary channels as it may construct and join to its main channel as is now required by the act creating said Sanitary District.”

In other words, the Sanitary District, by this act, is required to produce a flow of 20,000 cubic feet of water per minute for each 100,000 population at a current of not more than three miles per hour. This provision applies to the auxiliary channel, to-wit, the channel connecting the north branch of Lake Michigan at Wilmette and the north branch of the Chicago River and can be determined by the engineers of the city by an investigation of the population at any given point on said channels.

In Section 1097 of The Code, as amended October 28, 1912 (Council Proceedings, p. 2141) it is provided that the harbor of Chicago shall consist of the Chicago River and its branches to their respective sources, the Ogden Canal, all slips adjacent and connected with the Chicago River, etc.

In Sections 1130 to 1134 of The Code provisions are made forbidding the pollution of the harbor of Chicago and providing a fine of not less than \$50.00 nor more than \$100.00 for each such offense.

Section 1132 applies particularly to the subject of trade wastes and is as follows:

“1132. RIVER, LAKE—REFUSE MATTER—PENALTY.) Any distiller, tanner, brewer, butcher, pork or beef packer, soap boiler, tallow chandler, dyer, livery stable keeper, or other person whatsoever who shall cause or suffer any offal, manure, rubbish, filth, still slops, or any refuse animal or vegetable matter, or any foul or nauseous liquid to be discharged out of or flow from any premises owned or occupied by him, or to be thrown into, deposited or left in the harbor, shall be fined not less than twenty-five dollars and not more than one hundred dollars for each offense.”

Therefore, in conclusion, I am of the opinion in reference to your first question that the City of Chicago has the right to prevent the pollution of the Chicago River by trade wastes, but has not the right to prevent the Sanitary District from making use of said river as a channel for carrying off the sewage of said district if the Sanitary District complies with Section 23 of the Act of 1889, namely, provides a flow of 20,000 cubic feet of water per minute for each 100,000 people living in the territory tributary to said river.

Your second question was, “Does not the introduction of sewage from cities and villages outside of Chicago into the north shore channel militate against the interests of Chicago?” The cities and villages outside of Chicago which drain into the north shore channel would, as Mr. Justice Vickers says in the case of *Judge v. Bergman*, empty their sewage into Lake Michigan and this sewage would in turn pollute Lake Michigan and thereby cause the water supply of the City of Chicago to be contaminated so that the purpose of the extension of the boundaries of the Sanitary District to include these north shore towns and to turn their sewage into the Chicago River and thence into the Sanitary District channel was to prevent this contamination and pollution, and while it does in a way cause sewage to flow through the north branch of

the Chicago River, that would not in the state of nature flow through the river, I am of the opinion that the greater benefit which is derived by the City of Chicago at large by reason of preventing the contamination of its water supply by the sewage of these north shore towns is superior to the detriment done to the north branch and that the introduction of sewage from cities and villages outside of Chicago into the north shore channel does not militate against the interests of the City of Chicago, and that by reason of the fact that the Legislature of Illinois has authorized the Sanitary District of Chicago to extend its boundaries and take in these towns, the City of Chicago cannot object to the use of the north shore channel for that purpose.

In your letter you ask as to whether the principles involved in the above questions are applicable to the entire city. The general principles would, in a measure, be applicable to the entire city but it would be advisable that your commission should refer to this department any specific inquiry you should have upon the matter in order that there may be no conflict between the jurisdiction of the city and the Sanitary District.

Very respectfully yours,
MORTON S. CRESSY,
Assistant Corporation Counsel.

Approved:
SAMUEL A. ETTELSON,
Corporation Counsel.

Photo-Play "The Birth of a Nation".

February 26, 1916.

HON. OSCAR DEPRIEST, Alderman, Second Ward.

Dear Sir:

Replying to your request for a detailed history of the litigation in the Superior and Appellate Courts relative to the photo-play known as "The Birth of a Nation" we submit the following record facts, together with the steps taken in the case by this department.

On the twenty-fifth day of February, 1915, former Mayor Carter H. Harrison directed the General Superintendent of Police to issue to the owner of the film a limited permit for the exhibition of the photo-play in question. The picture was not censored by the legally constituted board of censors under the jurisdiction of the Second Deputy Superintendent of Police. On the contrary, they were privately exhibited to a party of friends, including Mrs. Harrison, the Mayor's wife, and his private secretary, Mr. Charles Fitzmorris.

When the picture was advertised for exhibition at the Illinois Theater beginning June 1, 1915, the attention of Mayor William Hale Thompson was called to the fact that the film had not been legally censored, he issued an order on May 22, 1915, revoking the permit theretofore issued. The then owner, Joseph J. McCarthy, immediately sought recourse through the Superior Court to prevent the enforcement of the order of revocation issued by Mayor Thompson. A bill for an injunction was filed, to restrain police interference. It was contended that the permit issued by Mayor Harrison was a valid one, and that vested property rights had been acquired thereunder. The case in its regular order of filing was assigned to Superior Court Judge Foell. Counsel for the complainant (McCarthy) immediately applied for a change of venue from Judge Foell and also named as additional judges upon which the bar of prejudice was placed, Judges Goodwin, Kavanagh, McKinley and Sullivan. The case was upon motion, uncontested, transferred for hearing, on the application for a preliminary injunction, to Judge Wm. Fenimore Cooper. On June 3 and 4, 1915, the cause was heard. Complainant's contention was that the original permit was valid in all respects. The city insisted that it was without binding legal force and effect because the proper authorities had not censored the picture. Evidence in support of each contention was offered, and after argument of counsel Judge Cooper on June 5, 1915, entered a temporary injunction restraining the city from interfering with the exhibition of "The Birth of a Nation." An appeal was prayed and allowed by the city to the Appellate Court. Mr. Richard S. Folsom was then corporation counsel, and Messrs. George L. Reker and S. A. T. Watkins, former assistant corporation counsel, were in charge of the case.

What is termed a "short record" was filed by the city in the Appellate Court on July 3, 1915. The statute on appeals from interlocutory injunctions provides that such appeals must be taken in thirty days and perfected in sixty. On account of the illness of Judge Cooper and other causes Mr. Reker was unable to file the additional record within the sixty days. Accordingly a stipulation was entered into between opposing counsel, on September 8, 1915, to file the additional record instantler, which was done. Briefs by both parties were thereafter written and filed. On October 14, 1915, appellee (McCarthy) by counsel filed a motion in the Appellate Court to dismiss the appeal. In support of the motion suggestions were filed in which it was urged that the appeal not having been perfected in sixty days as required by statute, the Appellate Court was without jurisdiction. Counter suggestions were filed by the city, and later orally argued before the full court. On January 29, 1916, the Appellate Court handed down an opinion holding that the failure to file the complete record within sixty days, the time provided by statute, was not cured by stipulation between the parties. In accordance with the above ruling the case was dismissed.

The merits of the case, however, were in no respect decided by the Appellate Court. The opinion closes with this language:

"The dismissal of this appeal, however, does not in any way affect the merits of the controversy, and the parties are at liberty to proceed to a hearing on the bill after answers are filed, and have determined any and all issues that may be joined."

An answer to the bill has already been filed, and it is the intention of this department to have the case set down for trial at an early date for final disposition. While under the preliminary injunction the exhibition of "The Birth of a Nation" was protected from interference, it is the hope of this department that upon the trial of the case on its merits in the *Nisi Prius* court a decree may be obtained which will prevent it, and all other photo-plays of similar character, from again being exhibited in Chicago.

As a matter of information we desire to advise that in the month of December, 1915, the owners of "The Birth of a Nation" by mandamus proceedings commenced in the Superior Court sought to compel the city to issue an unrestricted permit so that children would be permitted to see the picture. This petition, on hearing, in which a representative of this department appeared for the city, was dismissed by Superior Court Judge Foell.

The information contained herein briefly states the history of this case, and we hope it answers your request.

Very truly yours,

LOUIS B. ANDERSON,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Completion of Contract After Time Limit Has Expired.

March 3, 1916.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

We have your letter of the 9th ultimo relative to the question of damages on account of failure to complete, within the specified time, the contract of John Griffiths & Son Company, on the part of the contractor, together with copy of contract and letter of Mr. E. C. Shankland, Chairman of the Harbor & Subway Commission, recommending payment of the final voucher of \$19,415.40.

It appears that the work was accepted on November 16th, which was 138 days after the date specified in the contract—July 1, 1915. We are advised by the Chairman of the Harbor & Subway Commission under date of February 18, 1916, that 88 days of the delay were due to the strike of the building trades, and that 15 days additional delay was occasioned by orders of the Commission to suspend work on account of wet weather, and that 21 days additional delay was caused be-

cause of inability of the contractor to proceed with his work by reason of the dredge work then being prosecuted.

The contract in its provisions provides that no damages shall be claimed by the city for any delay caused by strikes, or upon orders of the Commission, and further that Sundays and holidays shall not be counted in claiming such damages.

This would account for 125 days, being 88 days by strike, 15 days by order of the Commission and 22 holidays and Sundays between July 1st and November 16th.

As to the delay of 21 days caused by failure of another contractor to complete the dredge work, and without which completion, as appears from the letter of the Harbor & Subway Commission, it was impossible for John Griffiths & Son Company to proceed with the work under its said contract. We are of the opinion that the City of Chicago cannot legally collect damages from John Griffiths & Son Company for this 21 days delay.

In the case of *Strobel Steel Construction Co. v. Sanitary District of Chicago*, 160 Ill. App. 559, the court said:

“The plaintiff contends, and we agree with its contention, that the contract and the work required to be done thereunder was an entirety, and that the date when the plaintiff was to receive the site was the date provided for in the contract when it was to commence the work; and that it did not receive the site under the contract until every part of the site had been cleared of obstructions and the entire location of the dam delivered over to the plaintiff for the performance of its work. In our opinion there was an implied obligation on the part of the defendant to furnish to the plaintiff, within fifteen days from the date of the contract, the entire site of the dam cleared of obstructions upon which to build the dam in question, without interference on the part of the defendant.

“We are of the opinion further that the delay of the defendant in locating to the plaintiff the site cleared of all obstructions, for the erection of the dam, and the fact that defendant permitted the plaintiff to proceed with the work after the time fixed for its completion and accepted the work, tends to show that the time limit was either waived altogether, thus giving the plaintiff a reasonable time to complete the contract, or, that defendant

extended the contract time of completion by a period equal to the delay caused by the defendant either in failing to deliver the site or in obstructing the work of the plaintiff after the work had been commenced, and that the defendant thereby waived any and all right to the liquidated damages provided for in the contract for delay on the part of the plaintiff. (*Taylor v. Renn*, 79 Ill. 181; *Paddock v. Stout*, 121 *id.* 571; *Bloomington Hotel Co. v. Garthwait*, 227 *id.* 613; *Nibbe v. Brauhn*, 24 *id.* 268; *City of Chicago v. Duffy*, 117 Ill. App. 261; *Smith v. Sanitary District of Chicago*, 108 *id.* 69; *Eyster v. Parrott*, 83 Ill. 517.)”

In the case of *Michigan Avenue M. E. Church v. Hearson*, 41 Ill. App. 92, the court held that the owner of a building was responsible in damages to a contractor who was delayed beyond a reasonable time by the failure of other contractors to complete their work. The court said:

“It is shown by the evidence that appellees were greatly delayed in the performance of their work by the failure and dilatoriness of other contractors. The stone work was not done on time, nor the plastering, and on the whole, appellees were some eight months longer on the job than they should have been. There was an advance in the cost of materials and of labor, before they could do the work, which would not have affected appellees if they had been permitted to proceed with their work with reasonable diligence. While no time is fixed by the contract within which the carpenter work is to be finished, it is implied that it shall be done within a reasonable time and that appellant will so arrange with reference to the other work on the building that appellees may complete it within such reasonable time. (*Taylor v. Renn*, 79 Ill. 182; *Toby v. Price*, 75 Ill. 645; *Nelson v. Pickwick Ass. Co.*, 30 Ill. App. 333, and cases there cited.)”

As the allowance of the 21 days delay to John Griffiths & Son Company will make a total of 146 days for which no damages can be lawfully claimed by the city under the terms of the contract, and as there was but 138 days delay between the date of completion of the work as specified in the contract and the date of the acceptance of the work by the city, our conclusion is that the final voucher issued to John Griffiths &

Son Company should be paid in full as recommended by the Chairman of the Harbor & Subway Commission.

We enclose herewith copy of contract and specifications, also final estimate.

Very truly yours,

EDWARD H. WRIGHT,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Standardization of Positions in Law Department.

March 4, 1916.

HON. EUGENE R. PIKE, Comptroller.

Dear Sir:

We beg to call your attention to the aggregate deduction of \$54,341.67 from the total for salaries and wages resulting from the proposed standardization of positions of clerks, stenographers and investigators and the reorganization of the force employed in the Law Department, appearing on page 15 of the Appropriation Bill reported by the Committee on Finance for the fiscal year 1916. Such deduction would so cripple the Law Department that it could not perform the duties required of it with any degree of efficiency whatever. In addition to this phase of the situation, the proposed standardization is, in our opinion, illegal.

Under date of yesterday we gave Alderman Lawley an opinion as follows:

“Replying to your verbal inquiry with reference to the standardization of clerks, investigators and stenographers in the Department of Law, as proposed by the Committee on Finance, we beg to advise you that in our opinion such standardization is not permissible under the law. The effect of such standardization is to introduce quasi civil service regulations for such employes who are expressly exempted by the Civil Service Act. It tends practically to take away from the corporation

counsel his authority as head of the Law Department, conferred by the existing statutes and ordinances. Such a measure could never have been within the contemplation of the lawmakers who fully understood the confidential nature of the services of such clerks, investigators and stenographers and the high importance of having their positions within the immediate and absolute control of the corporation counsel. The effect of the proposed standardization ordinance would be unduly to limit, if not entirely take away from the corporation counsel such control and we, therefore, consider it invalid."

In view of this situation, we enclose herewith a form for an amendment striking out the objectionable reductions on page 15.

Yours very truly,
 GEORGE E. CHIPMAN,
First Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

**Appropriations for Costs and Expenses of Michigan
 Avenue Improvement.**

March 4, 1916.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

Owing to the fact that the propriety of paying the costs and expenses incident to the court proceedings relating to the Michigan avenue improvement has been attacked in the courts, it will be necessary to make provision for paying same out of the general corporate fund at least temporarily, in order to avoid legal obstructions and delays.

The bond issue is adequate to take care of these expenses, and you already have an opinion from this department concerning the validity of paying same out of the proceeds of such bonds. To overcome the obstacle that has been interposed we recommend that the appropriations be made in such

a way that the money will be paid out of the proceeds of the bond issue in the first instance unless a court of competent jurisdiction interferes, and in case of such interference or in case of other legal attack on the ground that there is a lack of power on the part of the city to use the proceeds of bonds in this way, then the payments may be made from the general corporate fund, which is to be reimbursed from the proceeds of bonds if it can be legally done.

In cases of this kind it has been the custom to make appropriations from the general corporate fund for the amounts required with a proviso calling for reimbursement from the proceeds of bonds, and then to make the same appropriations under a heading indicating that the same are to be drawn from such bond fund. This has been the practice for years, although we know of no reason why such duplicate appropriations should be made.

In our opinion it is sufficient in cases of this kind to make the appropriations in such a way as to form a part of the general corporate fund appropriations with a clause providing for reimbursement from the bond issue. This is especially true in this instance because we deem it necessary to insert a special section concerning the appropriation in order that progress on the Michigan Avenue Improvement case may not under any circumstances be impeded.

We have drafted a set of amendments to carry this idea into effect which we have bound together and marked "A," which is intended to be used in committee of the whole for amending the tentative ordinance submitted by the Committee on Finance. We have also prepared another set marked "A-1," which is intended to be used if necessary after the report of the committee of the whole is made to the Council. The second set will, of course, not be required if the committee of the whole adopts the amendments.

In view of the fact that you may feel disposed to pursue the method that has been in vogue by which the appropriations are made in duplicate we have also prepared two sets of amendments marked "B" and "B-1," respectively, which are intended to accomplish the same purpose by the old method.

In each case we have prepared an amendment in the shape of a separate section setting forth the intention of the City Council in the most explicit way, and also an amendment correcting the appropriation at the top of page 71 of the printed report so as to make same conform to the amendments to be offered.

We enclose the four drafts above set forth herewith.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Licensing of Park Plumbers.

March 4, 1916.

VERNON L. BEAN, Esq., Secretary, Board of Examining Plumbers.

Dear Sir:

We are in receipt of your favor of February 26, 1916, requesting an opinion as to whether or not plumbers operating in the West and South Park systems of this city can be required by the city to secure licenses.

In reply we beg to advise you that the Supreme Court of this State has decided that the several Boards of Park Commissioners in the city, which, under statutory authority, control and govern the park districts, are separate and independent municipal corporations; that each of them is within the purview of its authority entirely independent of the City of Chicago.

West Chicago Park Commissioners v. Chicago, 152 Ill. 392.

Montgomery Ward v. Field Museum, 241 Ill. 496.

In view of the doctrine asserted in these and other decisions of our Supreme Court, we think it is doubtful that the Board of Examining Plumbers of the City of Chicago has such jurisdiction within the various park districts as would authorize it to enter upon the territory of the parks and to forcibly stop plumbing work there being done, on the ground that it is being done by unlicensed plumbers contrary to the ordinances of the City of Chicago. All of the various park districts of the city are governed by rules and ordinances promulgated by the Park Board.

It is provided by Section 1782 of The Chicago Code of 1911 that "no person except a licensed plumber shall be permitted to make any alteration or repair to or do any work in or about any pipe or pipes connected with any part of the city waterworks system or with the pipes or sewers connected with the city sewer system."

We are inclined to think that the city might properly, in the exercise of the power given by this section, notify the Park Commissioners of the West and South Park systems that no water pipes laid by unlicensed plumbers would be allowed to connect with or take water from the city water main. If such a warning could not be carried into effect by the city without also shutting off other pipes not laid by unlicensed plumbers, that would be the fault of the Park Commissioners and not of the city. The commissioners could at any time put themselves in the position to receive water for their main system by disconnecting the particular pipe objected to.

We respectfully suggest that before any coercive measures are taken or threatened by the Board of Examining Plumbers that you forward a copy of this letter to the Park Board of the West and South Park systems and ask them if they will not take steps to cause their contractors to cease employing unlicensed plumbers. If the Park Boards shall decline to do anything in this direction or claim that they are unable to control the action of their contractor in the matter, it will then be time enough for your board to take up the question with this office as to whether or not there is

any form of action which your board or the city can take in the matter.

Yours very truly,

JAMES W. BREEN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTIELSON,
Corporation Counsel.

**Exemption of "Eleanor Organization" from Payment of
Water Rates.**

March 9, 1916.

HON. WM. R. MOORHOUSE, Commissioner of Public Works.

Dear Sir:

In answer to your request, dated February 21, 1916, for an opinion as to the legal status of the "Eleanor Association" with reference to the application of the directors for exemption of payment of water rates under Section 2755 of The Chicago Code of 1911, we beg to advise:

From an investigation, we find that the "Eleanor Association" was incorporated January 10, 1906, under and by virtue of the laws of this State for pecuniary profit, the capital stock of said corporation being \$5,000. The articles of incorporation state "the object for which it is formed is to furnish, establish and maintain homes and accommodations for working women receiving a low wage."

Our investigation further discloses that while the said corporation was originally incorporated for profit, yet, since the original capital stock was paid in no profits have been earned, nor has there ever been any distribution made among the stockholders. On the contrary, all donations of whatever nature, kind or description have been used for the furthering of the objects for which the "Eleanor Association" was organized.

Under date of March 2, 1914, this department, at the request of Alderman A. W. Beilfuss, Chairman of the Subcommittee on Finance, furnished an opinion upon the peti-

tion of the "Eleanor Association," seeking the same relief now under consideration, and on account of the fact that the "Association" was shown to be merely a corporation organized for profit, this department declined to recommend it being placed on the exempted list. Since then, however, the "Eleanor Association" on, to-wit, August 27, 1914, entered into a trust agreement with the following persons, viz.: Florence Dibell Bartlett, Charles E. Coleman, Mary Pomeroy Green, Ina Law Robertson and Raymond M. Ashcraft, and their successors, in which the entire capital stock of the "Eleanor Association" was transferred and assigned to the above named trustees for the charitable purposes and conditions named in the trust agreement.

Among the purposes for which the trust was created, the following appear:

"(1) That these homes or clubs should be conducted on a sane business basis, each one meeting its entire expense of maintenance including interest on moneys invested in its furnishings.

"(2) That as far as possible the girls should share in the government of their clubs; and

"(3) That the work, though non-sectarian, should stand for broad but definite Christian teaching and be open to girls of all faiths or of none."

Paragraph Two of the Trust Agreement further provides:

"At no time shall there be any profit or pecuniary gain derived from said Association by said Trustees, or by any of the officers of, or contributors to, said Association; Providing, however, that said trustees shall be entitled to be repaid by said Association any expenses incurred by them in the proper administration of this trust; and no part or portion of the assets of said Association, be the same profits or surplus or otherwise, shall ever be directly or indirectly distributed to, or paid to, the stockholders of said corporation."

The Trust Agreement is in perpetuity and provides that in the event of the dissolution of the corporation, the assets shall be applied to the creation of a trust fund, endowment or otherwise, "in aiding or promoting some constructive educational work, conducted on behalf of working women, preferring, where possible, the educational advancement of individuals."

In view of the fact that this trust agreement imposes upon the trustees a charitable work, the proceeds of all character from which shall be forever applied to charitable purposes, we are of the opinion that the "Eleanor Association" is a charitable institution within the meaning of Section 2755 of The Chicago Code of 1911, and it is entitled to the exemption provided therein. The "Eleanor Association" is conducting six separate clubs and each of these clubs should be exempted from the payment of water rates.

Very truly yours,

LOUIS B. ANDERSON,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

**Exemption of "Ruth Home for Girls" from Payment of
Water Rates.**

March 9, 1916.

HON. W. R. MOORHOUSE, Commissioner of Public Works.

Dear Sir:

Replying to your request under date of February 21, 1916, for an opinion as to whether the "Ruth Home for Working Girls," whose officers have made application for exemption from payment of water rates under Section 2755 of The Chicago Code of 1911, is entitled to such exemption, we beg to advise:

The section of the Code in question provides:

"The Commissioner of Public Works shall remit and cancel all water rates and charges heretofore levied and assessed or which may hereafter be levied and assessed against such property of any charitable, municipal, religious or educational institution in the city as is used in the immediate conduct or carrying on of the charitable, municipal, religious or educational purposes of such institution and which is not used for gain or profit or rented, conducted, maintained or operated for the purpose of producing revenue for such institution, * * *"

We have examined the charter of this corporation and also conferred with the president of the institution. From the information obtained it appears that this institution is organized for the purpose of furnishing at cost board and room for working girls; that it is now and continuously since its charter was granted, actually engaged in that class of charity; that no individual or individuals are beneficiaries of the profits, if any, accruing from this charitable service, and that all income from whatever source under its by-laws is to be used exclusively for the charitable purpose named in the charter.

In view of the foregoing facts we are of the opinion that the corporation in question is a charitable one and clearly falls within the provision for exemption provided in Section 2755 of the Chicago Code.

This, however, applies only to the building or buildings occupied by said "Ruth Home for Working Girls" and used exclusively for the charitable purposes mentioned in the articles of incorporation.

Very truly yours,

LOUIS B. ANDERSON,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

**Closing of All Grocery, Meat Market and Delicatessen
Stores on Sunday.**

March 7, 1916.

HON. CHARLES C. HEALEY, General Superintendent of Police.
Dear Sir:

In response to your inquiry made at the request of Mr. A. G. Hambrook, Secretary of the United Grocers and Butchers of Chicago, as to the legality of an ordinance compelling the closing of all food stores on Sunday, that is, all grocery, meat market and delicatessen stores, permit me to say:

The request, as we understand it, is to include grocery,

meat market and delicatessen stores only, and it is in regard to this in particular that they wish to be advised. Under the authority of *McPherson v. Village of Chebanse*, 114 Ill. 46, the court held that under Subdivision 66 of Section 62 of Article 5 of the Cities and Villages Act, giving power "to regulate the police of the city or village and pass and enforce all necessary police regulations," the city may pass an ordinance prohibiting persons from keeping open their places of business in such city or village for the purpose of vending goods, wares and merchandise on Sunday, and provide a penalty for the same. The court in that case at page 51 said:

"The keeping open by persons of their places of business in a community, on Sunday, for the exercise of the business of their ordinary callings, is a public and serious interference with the observance of the day in its accustomed mode of observance. It is obstructive of the purposes for which the day is set apart. It is offensive to the moral sense of the community. It disturbs the peace of society, in its open interference with the peace and quiet of a day devoted as a day of rest and for religious worship. It disturbs the good order of society, in publicly and flauntingly, and in defiance of public sentiment, desecrating a day, and inviting others to its desecration, set apart for purposes of the highest well being of human society, hence the entire harmony of the ordinance with the statute. As a police regulation, in the interest of the good order and well being of the community, the ordinance, in our opinion, finds justification."

The doctrine in the case of *McPherson v. Village of Chebanse*, *supra*, has been quoted with approval in

Ritchie v. Waymann, 244 Ill. 519.

City of Chicago v. Kluever, 257 Ill. 321.

City of Clinton v. Wilson, 257 Ill. 581.

City of Chicago v. Shaynin, 258 Ill. 74.

City of Marengo v. Rowland, 263 Ill. 531.

City of Chicago v. Mandel Brothers, 264 Ill. 210.

In the case of *City of Springfield v. Richter*, 257 Ill. 578, the court had under consideration an ordinance prohibiting persons from keeping open their places of business or pursuing

their daily occupations on Sunday. Said ordinance is as follows:

“Whoever shall on Sunday keep open, or permit to be kept open, his place of business, or shall pursue his daily labor or occupation, within said city, shall on conviction be fined not less than \$10 nor more than \$50: *Provided*, that this section shall not be applicable to persons who conscientiously observe some other day of the week as the Sabbath, nor in case of necessity, nor to hotels, eating houses, drug stores, tobacco stores, livery stables or street cars,”

and the court held it was not invalid for discrimination, because it exempted from such prohibition hotels, eating houses, drug stores, tobacco stores, livery stables and street cars, but did not exempt meat markets.

The case of *City of Clinton v. Wilson*, 257 Ill. 580, was an action brought by the City of Clinton against the manager of the Star Theatre for an alleged violation of a city ordinance. This ordinance is as follows:

“Sec. 55. PLACES OF AMUSEMENT CLOSED ON SUNDAY.—Whosoever shall on Sunday keep open any billiard room, ball or pin alley, baseball grounds or other place of amusement within said city, or shall suffer or permit persons to assemble therein for the purpose of play or amusement, shall for each offense be subject to a fine of not less than \$10 nor more than \$50.

“Sec. 56. PLACES OF BUSINESS CLOSED ON SUNDAY.—Whosoever shall on Sunday keep open, or permit to be kept open, his place of business, or shall pursue his daily labor or occupation within said city, shall on conviction be fined not less than \$10 nor more than \$50: *Provided*, that this section shall not be applicable to persons who conscientiously observe some other day of the week as the Sabbath, nor in cases of necessity or of charity, nor to hotels, eating houses, drug stores, tobacco stores, barber shops or livery stables.”

And again at page 583 the court says:

“It seems to be conceded by counsel on both sides that statutes which set apart Sunday as a day of rest and prohibit the doing of certain things on that day have for their object the promotion of the health and good order of society, and are generally held constitutional as within the domain of the police power of the States.

(37 Cyc. 541.) This court has said: 'The legislature has the sole power to prohibit every kind of secular labor or business on Sunday, or such only as it may choose, but we have no power to prohibit any labor or business on that or any other day. We can only enforce the law as it is enacted. When the legislature shall prohibit labor, whether it shall disturb others or not, and the transaction of business or the making of contracts, we will unhesitatingly carry out the legislative will, but we can neither add to nor detract from statutes as they are enacted.' (*Richmond v. Moore*, 107 Ill. 429.)''

And again on page 584 the court says:

"Did the Cities and Villages Act authorize the City of Clinton to enact said Section 56 of the ordinance? The power of a city to pass an ordinance must be found in its charter in express terms, or it must be necessary to carry out the powers expressly granted, or be essential, and not simply convenient, to the declared objects and purposes of the corporation. (*City of Chicago v. Weber*, 246 Ill. 304; *City of Chicago v. M. & M. Hotel Co.*, 248 *id.* 264.) It may be conceded that under the Cities and Villages Act there is no provision granting to the city authorities, in express terms, the authority to set apart Sunday as a day of rest and prohibit labor on that day. Clause 66 of Section 1 of Article 5 of the Cities and Villages Act (Hurd's Stat. 1911, p. 266), gives the power to the authorities of incorporated cities and villages 'to regulate the police of the city or village, and pass and enforce all necessary police ordinances.' Under this general grant of power this court held that the Village of Chebanse was authorized to pass an ordinance prohibiting anyone from engaging in the business of vending goods, wares and merchandise in said village on Sunday. (*McPherson v. Village of Chebanse*, 114 Ill. 46; *Ritchie & Co. v. Wayman*, 244 Ill. 509) this court upheld the rule laid down in *McPherson v. Village of Chebanse*, *supra*, that an ordinance of a municipality prohibiting persons from keeping open places of business on Sunday was a proper exercise of the police power, and quoted that decision on this question with approval. In *Gundling v. City of Chicago*, *supra*, this court upheld an ordinance of the City of Chicago regulating the use of cigarettes as being within the power of the city to enact under said clause 66.

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"It is insisted, however, by counsel for appellee, that the ordinance in the McPherson case, *supra*, was a general one, and did not except from its provisions certain enumerated classes of business, as does the ordinance here; that this ordinance discriminates between persons of the same class, and is therefore unreasonable and void. While the opinion in the case referred to does not set out the ordinance there under discussion, the records on file in this court show that said ordinance did contain certain exceptions with reference to meat markets, drug stores, groceries and barber shops. *When the subject matter and provisions of a municipal ordinance are left to the discretion of the city council, such discretion is not absolute, but is subject to the limitation that the ordinance must be reasonable.* When the power to legislate on a given subject is conferred and the mode of its exercise is not prescribed in the charter, then an ordinance passed in pursuance thereof must be a reasonable exercise of that power. *City of Lake View v. Tate*, 130 Ill. 247.

"It is contended by counsel that this ordinance is unconstitutional because it is special legislation. This court has said that if all laws were held unconstitutional because they did not embrace all persons, few would stand the test; that a law is general, not because it embraces all the governed, but that it may, from its terms, when many are embraced in its provisions, embrace all others when they occupy like positions to those who are embraced. (*Hawthorn v. People*, 109 Ill. 302.) A law that is made applicable to a certain class or classes of citizens must be based upon some substantial difference between the situation of that class or classes and other individuals or classes to which it does not apply. (*Ritchie & Co. v. Wayman, supra.*) We think a substantial difference exists in the classes of employment and business embraced within the prohibition of Section 56 and those excepted from such prohibition."

The power of the City of Chicago to pass ordinances prohibiting the carrying on of business on Sunday is subject to the restriction that such ordinances must be reasonable, and not discriminatory as to the class of business prohibited. This principle is fully discussed in the case of *City of Clinton v. Wilson, supra*.

In the case of *City of Marengo v. Rowland*, 263 Ill. 531, the court had under consideration the following ordinance:

“Sec. 1. That hereafter it shall be unlawful for any barber shop or shops, tonsorial parlor or parlors, to be opened for business on the first day of the week, commonly called Sunday, nor shall any tonsorial business be done in any of said shops or parlors on said first day of the week. A violation of the provisions of this ordinance shall subject the offender to a penalty of not less than ten dollars (\$10) and not exceeding the sum of twenty-five dollars (\$25) for each offense. The term Sunday, under this ordinance, shall include the period between the usual closing hour on Saturday night and twelve (12) o'clock midnight on the following night.”

At page 532, the court said:

“This court, in *Eden v. People*, 161 Ill. 296, held unconstitutional a statute substantially like the ordinance here in question. Counsel on both sides concede that unless that decision is overruled or can be distinguished the decision of the Circuit Court must be upheld. Counsel for appellant, however, contend that this court, in effect, has overruled that decision in *City of Springfield v. Richter*, 257 Ill. 578, *City of Clinton v. Wilson*, 257 *id.* 580, and other recent cases of like character. With this we do not agree. In the two cases just cited, ordinances were construed which forbade, generally, the keeping open of business places or pursuing ordinary day labor on Sunday, but containing provisos excepting persons who usually observe some other day of the week as the Sabbath, and excepting cases of necessity, hotels, eating houses, drug stores, and certain other enumerated lines of business. In every case in this State relied upon by counsel for appellant as not being in harmony with *Eden v. People*, *supra*, there was no attempt to overrule, in terms, the latter case. On the facts and the law every one of those cases is readily distinguishable. *It requires no argument to prove that there is a well marked difference between an ordinance which forbids all secular business on Sunday, with certain clearly defined and reasonable exceptions, from one which picks out one particular business and forbids it being exercised on Sunday but permits all other kinds of business.*

* * * * *

“Under the Cities and Villages Act no provision is found granting to municipalities, in express terms, the authority to prohibit labor on Sunday and set that day apart as a day of rest. Clause 66 of Section 1 of Article

5 of the Cities and Villages Act (Hurd's Stat. 1911, p. 266), gives the power to incorporated cities and villages to regulate the police of the city or village and pass and enforce all necessary police ordinances. It was under this general grant of power that this court upheld ordinances prohibiting, generally, the engaging in business on Sunday, with certain reasonable exceptions, in *McPherson v. Village of Chebanse*, 114 Ill. 46, *City of Springfield v. Richter, supra*, and *City of Clinton v. Wilson, supra*. Said Section 1 of Article 5 was amended as to several clauses and the entire section re-enacted in 1911 (Laws of 1911, p. 173), but no change was made in said clause 66 or any other clause that in any way enlarged the authority of municipalities on the question here under consideration. It must be assumed that the Legislature then had in mind the ruling of this court in *Eden v. People, supra*, and therefore did not intend to extend the authority of municipalities on this question. The present statutes and general laws of the state should be construed in the light of that decision."

And again, on page 535, the court said:

"The decisions cited from other jurisdictions by counsel for appellant need not be considered. Most of them were in relation to laws very similar to the English statute heretofore referred to. Moreover, with few exceptions, the acts or ordinances construed were general in their nature, substantially similar, in wording, to the ordinances in *McPherson v. Village of Chebanse, supra*; *City of Springfield v. Richter, supra* and *City of Clinton v. Wilson, supra*. The fact barbers were included in those lines of business prohibited in the ordinances in *City of Springfield v. Richter, supra*, and were in the excepted classes in *City of Clinton v. Wilson, supra*, does not render those two decisions inconsistent with each other or with *Eden v. People, supra*. In those two cases, in harmony with a long line of other decisions rendered by this court, it was held that a law or ordinance applicable to a certain class or classes of citizens, to be constitutional must be based upon some substantial difference between the situation of such class or classes and other individuals or classes to which it does not apply. In *Eden v. People, supra*, it was held that there was no substantial difference in the business done by barbers from that done in many other lines of employment, while in the other two cases just referred to it was held that there

was a substantial difference existing in the classes of employment and business embraced within the prohibitions in the ordinance and those excepted from such prohibitions.

"The judgment of the Circuit Court will be affirmed.

JUDGMENT AFFIRMED."

As the avowed purpose of the United Grocers & Butchers' organization is to effect a permanent closing of all food stores on Sunday, it is evident that the ordinance they wish to have passed would be confined exclusively to the stores they mention, that is, grocery, meat market and delicatessen stores. The three cases cited in this opinion contain substantially all the law on this subject, and after a careful examination of these opinions we are satisfied that the City of Chicago could not lawfully pass an ordinance which would be confined exclusively to grocery, meat market and delicatessen stores, and would except all other business from its effect.

Yours very truly,

GEO. A. CURRAN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTTELSON,

Corporation Counsel.

**Authority of Police Officer to Serve a Notice on Persons
When Found Violating Any Municipal Ordinance
or Law Punishable by Fine Only.**

March 8, 1916.

HON. CHARLES C. HEALEY, General Superintendent of Police.

Dear Sir:

We are in receipt of your letter of the 5th inst. transmitting a communication of Alderman William E. Rodriguez, relative to an order passed by the City Council at its regular meeting on February 14, 1916, with reference to the release of persons arrested on view for violation of any municipal

ordinances or *laws of this state* which are punishable by fine only, in which letter you wish to be advised whether or not this order is legal and what, if any, action you should take in the same.

The order of the Council, herein referred to, appearing on pages 3283 and 3284 of the Journal of the Proceedings of the City Council of February 14, 1916, is as follows:

“BE IT RESOLVED, That the Council instruct the general superintendent of police to issue an order directing the police officers of this city that before any officer shall make an arrest on view for a violation of any municipal ordinance or law of this state, punishable by fine only, and not by imprisonment, such officer shall ascertain the name, residence and place of employment or business of the person so liable to arrest, and if satisfied that such person has a permanent home or place of business, or a steady place of employment, to give such person notice in writing to appear before some branch of the Municipal Court, at the opening of court on the following morning, instead of taking such person in custody.

“If the officer is not satisfied with the information obtained, he should take such person to the nearest police station, and it shall be the duty of the officer in charge of the station immediately to cause to be ascertained the name, residence, place of employment or business of such person, and if satisfied that such person has a permanent home, place of business, or a steady place of employment, to release such person upon giving him or her notice in writing to appear as aforesaid.

“Provided, however, that such order shall not apply to cases for the violation of any law or ordinance prohibiting gambling, carrying concealed weapons, nor where the person about to be arrested is a pickpocket or confidence man, or is in such condition where his own welfare or the welfare of the community requires that he be kept in custody until released by due process of law.”

The subject matter of this resolution is fully covered in an opinion rendered to you under date of December 18, 1915, which opinion is as follows:

“IN RE AUTHORITY OF A POLICE OFFICER OF THE CITY OF CHICAGO TO SERVE A NOTICE ON A JUVENILE BETWEEN THE AGE OF 17 AND 21 WHEN FOUND VIOLATING ORDINANCES OF THE CITY OF CHICAGO OR OTHER MUNICIPALITIES.

"HON. CHARLES C. HEALEY, General Superintendent of Police, Chicago, Illinois.

"Dear Sir:

"The above question is governed by several sections of the statutes and one section of the city ordinances.

"Section 340 of Chapter 38, Hurd's Revised Statutes of 1911, provides:

" 'DUTY OF OFFICERS.) § 2. It shall be the duty of every sheriff, coroner, constable and every marshal, policeman, or other officer of any incorporated city, town or village, having the power of a sheriff or constable, when any criminal offense or breach of the peace is committed or attempted in his prescence, forthwith to apprehend the offender and bring him before some justice of the peace, to be dealt with according to law; to suppress all riots and unlawful assemblies, and to keep the peace, and without delay to serve and execute all warrants, writs, precepts and other process to him lawfully directed.'

"Section 68 of the Cities and Villages Act provides:

" 'In all actions for the violation of any ordinance, the first process shall be a summons: Provided, however, that a warrant for the arrest of the offender may issue in the first instance upon the affidavit of any person that any such ordinance has been violated, and that the person making the complaint has reasonable grounds to believe the party charged is guilty thereof; and any person arrested upon such warrant shall, without unnecessary delay, be taken before the proper officer to be tried for the alleged offense. * * *'

"Section 83 of the Cities and Villages Act provides:

" 'The trustees in villages, the mayor, aldermen, and the marshal and his deputies, policemen and watchmen in cities, if any such be appointed, shall be conservators of the peace, and all officers created conservators of the peace by this act, or authorized by any ordinance, shall have power to arrest or cause to be arrested, with or without process, all persons who shall break the peace, or be found violating any ordinance of the city or village, or any criminal law of the state, commit for examination and, if necessary, detain such persons in custody over night or Sunday in the watch house or any other safe place, or until they can be brought before the proper magistrate, and shall have and exercise such other powers as conservators of the peace as the City Council or Board of Trustees may prescribe. * * *'

“Section 299 of the Cities and Villages Act relating to the arrest and imprisonment of persons violating any ordinance of the several cities and villages in this state, provides:

“ ‘That in all actions for the violation of any ordinance of any city or village organized under any general or special law of this state, the first process shall be summons: Provided, however, that a warrant for the arrest of the offender may issue in the first instance, upon the affidavit of any person that any such ordinance has been violated, and that the person making the complaint has reasonable grounds to believe the party charged is guilty thereof; and any person arrested upon such warrant, shall, without unnecessary delay, be taken before the proper officer, to be tried for the alleged offense. * * *

“Section 1937 of The Chicago Code of 1911, provides as follows:

“ ‘The several members of the police force of the city when on duty shall devote their time and attention to the discharge of the duties of their stations according to the laws and ordinances of the city *and the rules and regulations of the department* to preserve order, peace and quiet and enforce the laws and ordinances throughout the city. They shall have power to arrest all persons in the city found in the act of violating any law or ordinance, or aiding and abetting in any such violation and shall arrest any person found under circumstances which would warrant a reasonable man in believing that such person had committed or is about to commit a crime.’

“All of the foregoing provisions to be properly interpreted must be read in connection with Section 49 of The Municipal Court Act, which provides:

“ ‘§ 4. Any police officer of the City of Chicago may arrest on view any person who may be seen by said police officer in the act of violating within the City of Chicago any ordinance of said city, or any ordinance of any municipal corporation situated in whole or in part within the limits of said city whenever such violation is by such ordinance made punishable by fine or otherwise. Any person so arrested shall, without unnecessary delay, be taken by such officer to some convenient branch of the Municipal Court and such police officer shall thereupon make and file a complaint in writing under oath against such defendant of the violation by such defend-

ant of such ordinance and such defendant shall thereupon be dealt with according to law in the same manner as if he had been arrested in the first instance under a warrant lawfully issued.'

"Section 340 of Chapter 38 heretofore referred to, is the only provision which seems to make it mandatory upon police officers and others enumerated or mentioned in said section to arrest said violators and forthwith bring them before a justice.

"The offenses enumerated in Section 340 are, 'any criminal offenses or a breach of the peace.' The term 'breach of the peace' is a generic term, which includes riotous and unlawful assemblies and affrays, forcible entry and detainer, wanton discharge of firearms in public streets, or so near the chamber of a sick person that it will cause injury, the sending of challenges to a duel, provoking a fight, the going armed in public, without lawful occasion, in such manner as to alarm the public, and many other acts of a similar character. (*People v. Bartz*, 19 N. W. 161, 53 Mich. 493.)

"When this section is read in connection with Sections 68, 83 and 299 of the Cities and Villages Act, it can reasonably be seen that the Legislature did not intend to make Section 340 cover the offenses enumerated in the other sections. The other two sections, that is, Sections 68 and 299, provide that a summons shall be the first process in all cities for the violation of city ordinances.

"Section 83, which in substance covers the matter referred to in Section 340 of Chapter 38, provides that the officer shall have power to arrest or cause to be arrested, with or without process, all persons who shall break the peace or be found violating any ordinance of the city or village. This section would seem to vest a discretion in the police officer as to whether it would be advisable to arrest without process or to wait until process was had and then arrest. The summons herein referred to is a summons issued out of and under the seal of a court and is not the summons contemplated by your proposed order, which reads as follows:

" 'Chicago, Ill., 191.....

" 'Name

Address

You are hereby notified to appear in the Municipal Court Room City Hall on the day of, A. D. 191....., to answer to the charge of

in violation of the city ordinance in such cases made and provided. Said violation is alleged to have been committed on, 191.....

Unless you appear as notified, application will be made to the court for a warrant or capias for your arrest.

..... Patrolman
Star No. Prect.

Approved:

General Superintendent of Police.'

"The foregoing summons submitted by you is an informal notice for the defendant to appear in court to answer the charge of any violation of the city ordinance. The effect of this notice would be a mere request to the offender to come and avoid the necessity of arrest after process had been issued.

"Section 1937 of The Chicago Code of 1911, heretofore quoted, provides that they (police) shall have power to arrest all persons in the city found in the act of violating any law or ordinance, or aiding and abetting in any such violation, and shall arrest any person found under circumstances which would warrant a reasonable man to believe that such person had committed or is about to commit a crime.

"Section 1918 of The Chicago Code of 1911 vests in the general superintendent of police power to make rules and regulations for the guidance of the subordinate officers and members of his department. The proposed order dated December 13th from the general superintendent directed to the commanding officer would, in my opinion, be a rule or direction within the power granted to him under Section 1918, because it is an aid to said subordinate officers to help them in determining a discretionary power, that is when offenders seen violating such ordinances should be immediately apprehended. I do not think that the serving of this notice is a putting under arrest, in that the policeman does not take the party to be notified in charge. The notice herein contemplated is in substance a notice to appear in court on the following day, or that, in case of default therein said policeman will cause the court to issue a warrant for his arrest.

"I am, therefore, of the opinion that the order contemplated herein, in so far as it relates to the violation of city ordinances, would be a valid order, but that if said order were to be carried beyond the violation of

ordinances, it would be in conflict with the provisions of Section 340 of Chapter 38 of the revised statutes.

"Yours very truly,

"GEORGE A. CURRAN,

"*Assistant Corporation Counsel.*

"Approved:

"SAMUEL A. ETTELSON,

"*Corporation Counsel.*"

The foregoing opinion, as you will note, was in regard to the authority of a police officer of the City of Chicago to serve a notice on a juvenile between the age of 17 and 21 and found violating the ordinances of the City of Chicago or other municipalities. The resolution here in question is governed by the same sections of the statutes and ordinances. It attempts to cover violations of municipal ordinances and laws of this state punishable by fine. In so far as said resolution governs adults found violating city ordinances, it is subject to the same provisions governing minors, and our opinion of December 18th, hereinbefore shown, is applicable. It is not within the province of the General Superintendent of Police of the City of Chicago to issue an order covering persons found violating the laws of the state to be served with notice as the Council resolution contemplates, as it is in conflict with the provisions of Section 340 of Chapter 38 of the Revised Statutes.

We are of the opinion, therefore, that it is within the power of the general superintendent of police to issue an order governing adults found violating city ordinances to be served with a notice as contemplated in the Council resolution, but that it is not within the power of the general superintendent of police to issue this order so that it will cover persons found violating the state laws punishable by fine only.

Very truly yours,

GEORGE A. CURRAN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Fees for Inspection of Billboards and Signboards.

March 11, 1916.

HON. CHARLES BOSTROM, Commissioner of Buildings.

Dear Sir:

Replying to your letter of the 10th inst., in which you ask for a construction of the ordinance providing fees for inspection of billboards or signboards, we beg to say that this ordinance provides as follows:

“706. FEES FOR PERMITS AND ANNUAL INSPECTION—INDEMNIFYING BOND.) (a) The fee to be charged for permits issued for the erection or construction of billboards or signboards or for the alteration thereof shall be two dollars for each twenty-five lineal feet of billboard or signboard erected or altered. An annual fee shall be charged every person, firm or corporation as owner, or in possession, charge or control of any billboard or signboard for inspection of such billboards or signboards, which shall be thirty-five cents for each twenty-five feet of billboard or signboard, or fractional part thereof.”

It appears clearly from the language employed in the ordinance that the inspection charge is for individual billboards or signboards, and that such boards cannot be bulked in order to reduce the amount of the fees. Your department is entitled to make a separate charge for each board or panel bearing distinct and separate advertising, provided it comes within the size limit for which an inspection fee should be charged.

Very truly yours,

GEORGE E. CHIPMAN,
First Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

**Right of City to Prohibit the Erection of Buildings to be
Used for Business Purposes in Residence Districts.**

March 11, 1916.

HON. OLIVER L. WATSON, Alderman, 27th Ward, Council
Chambers.

Dear Sir:

Your verbal request to the corporation counsel for an opinion relative to the above matter has been referred to the undersigned for reply. Under Section 712½ of The Chicago Code of 1911, the City Council attempted to provide that no such buildings be constructed in residence districts of the city without frontage consents. In the case of *People ex rel. Julius P. Friend v. City of Chicago*, 261 Ill. 16, the court passed on the legality of the section mentioned and held it to be invalid, the court saying, at page 21:

“The owner of property has the constitutional right to make any use of it he desires, so long as he does not endanger or threaten the safety, health and comfort or general welfare of the public. This right cannot be wholly taken away or limited by the state except in so far as it may become necessary for individual rights to yield to the higher and greater law of the best interest of the public. (Citing *Haller Sign Works v. Training School*, 249 Ill. 436.) There is nothing inherently dangerous to the health or safety of the public in conducting a retail store. It may be that in certain exclusively residential districts the owners of residence property would prefer not to have any retail stores in such blocks, but if such be the case it manifestly arises solely from aesthetic considerations, disconnected entirely from any relation to the public health, morals, comfort or general welfare. Legislation, either by the state or by municipal corporations, which interferes with private property rights or personal liberty, cannot be sustained for purely aesthetic purposes. We do not find it possible, under any view of the law, to sustain Section 712½ of the ordinance.”

Thus it will be readily seen, under the construction given the law by our Supreme Court, that there is nothing to prohibit these buildings being erected.

Very truly yours,

W. H. DEVENISH,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Reconsideration of Ordinance Approved by the Mayor.

March 11, 1916.

HON. WM. HALE THOMPSON, Mayor.

Dear Sir:

Replying to your inquiry as to the powers of the City Council in respect to the reconsideration of an ordinance which has received the approval of the mayor and been signed by him, we beg to advise you as follows:

The statute providing for the approval of ordinances by the mayor reads as follows:

(Hurd's Revised Statutes 1913, p. 267, Chap. 24, Sec. 46):

“ORDINANCES—APPROVAL—VETO.) § 18. All ordinances passed by the City Council shall, before they take effect, be deposited in the office of the city clerk; and if the mayor approves thereof, he shall sign the same, and such as he shall not approve he shall return to the council, with his objections thereto, in writing, at the next regular meeting of the council occurring not less than five days after the passage thereof. Such veto may extend to any one or more items or appropriations contained in any ordinance making an appropriation, or to the entire ordinance; and in case the veto only extends to a part of such ordinance, the residue thereof shall take effect and be in force. But in case the mayor shall fail to return any ordinance, with his objections thereto, by the time aforesaid, he shall be deemed to have approved such ordinance, and the same shall take effect accordingly.”

It will be noted that this statute provides that if the mayor approves an ordinance he shall sign the same, and such as he shall not approve he shall return to the Council with his objections thereto, etc. There is no provision for the return to the City Council of an ordinance which has been signed.

An ordinance becomes a law as soon as it has had the approval and signature of the mayor. Thus it was said in *Railroad Company v. Voelker*, 129 Ill. 540, p. 548, in reference to a section of the Private Laws of 1869, substantially the same as above quoted, so far as the matters now under consideration are concerned:

“By this section, three separate modes are provided by which an ordinance, after being passed by the City Council may become operative, viz.: 1, by the approval of the mayor, evidenced by his signature; * * *.”

P. 549:

“True, an ordinance can have no validity until it has been passed by the Council and then placed in the mayor’s office, and afterwards approved and signed by him, or retained without action beyond the prescribed period, or passed over his veto.”

In *City of Roodhouse v. Johnson*, 57 Ill. App. 73, it was said, p. 78:

“We apprehend that in one sense, and a proper one, an act or ordinance, ‘takes effect’ or is ‘in force’ when the Legislature has done all it is required to do in order to give it force and effect according to the intention of that body, although it may not operate to accomplish the object intended, from that time, because that may clearly not be the intention of the act or ordinance. The actual accomplishment of that object may depend upon conditions thereafter to arise, as from the voluntary action of parties to be affected, or otherwise. For different reasons, natural or legal, it might not be possible for the act to have that effect immediately upon its passage, and in such case there could be no reasonable presumption that the Legislature intended it should. But by its passage they may have done all they were required to do to give it immediate validity as an expression of the legislative will, and by its own force to have that practical effect at the proper time. An example of this kind was presented in the case of *Chamberlain et al. v.*

The City of Litchfield, decided at this term, and they are quite common in the statute books. In *The People v. Reynolds*, 5 Gilm. 12, the court said: 'All such laws are perfect and complete when they leave the hands of the Legislature, although a future event shall determine whether they can take effect or not.' See also, *The People v. Solomon*, 51 Ill. 37; *Guild v. City of Chicago*, 82 *id.* 472. So it is clear that an act may be complete and perfect as a law, take full effect, in a proper sense, as such, from the time of its passage, and yet not take effect, in another sense, for some time thereafter, definite or indefinite, as the nature of the case for its effect in the latter sense may be."

It will thus be seen that when an ordinance has passed the Council and received the approval and signature of the mayor, it becomes a law. Any attempt at reconsideration by the Council would be an attempt to deal with a matter which is no longer before it, over which it has no control, and is as perfect and complete as the action of that body and the mayor can make it. True, by proper action, it may be repealed, but an attempt at reconsideration would be futile, as the ordinance is no longer before the Council and has passed beyond its jurisdiction, so far as reconsideration is concerned.

In *Skinner v. City of Chicago*, 42 Ill. 52, the Supreme Court of Illinois had under consideration statutory provisions concerning the passages of ordinances, which provisions were substantially identical, so far as the present question is concerned, with those now in force. It was there said, p. 53:

"It was again insisted, that if it is held to be an act, within the provisions of this section, under its provisions, it, by not being approved, took effect from the date of its presentation to the mayor for his approval. The section declares, that, if not approved or returned within five days after it is presented to the mayor, it shall take effect in the same manner as if he had signed it. It will not be contended, that such an act, signed by the mayor on the last day allowed him for consideration, takes effect from the day it is presented to him. *It manifestly takes effect from the date of its approval.* That is the last act necessary to its passage and to give it effect. Then when it is never signed by the mayor, how can it be said to take effect in the same manner as if signed by the mayor, when it is insisted that it takes effect at

an earlier period than it would have done if it had been signed by the mayor. He is allowed by law all of the five days for examination and consideration whether he will approve or return it with his objections, and the reasonable inference is, when he fails to approve, that he has employed the entire time for the purpose, and hence it only takes effect from the last of the five days. It is perfectly obvious that such an act can have no binding force until it is signed by the mayor, or the entire time allowed him has elapsed. It is not binding up to the last moment, if not approved; then by what means does it take effect five days previously? By attaching his signature, it takes effect at that precise time, and so when the last moment of time has transpired without the action of the mayor, the law gives it effect from that time. There is nothing in the language of the act to authorize a different construction."

Comment upon this plain statement of principles would be superfluous.

Upon a similar question, it was said in the case of *Ashton v. City of Rochester*, 60 Hun. 372, at p. 378:

"The ordinance in question, when passed over the mayor's veto, became a municipal law, and was as binding upon the people of the City of Rochester as the statute laws are binding upon the people of the state. *After a bill has passed the Legislature and becomes a law, it would be contrary to all parliamentary law and precedent for that body to attempt to reconsider it. The act might be repealed, but it could not be reconsidered.* The ordinance in question may be repealed, but it cannot be reconsidered, for the reason that when it was passed over the mayor's veto it became a law, and thereby passed beyond the control and power of the municipal council to reconsider it."

With reference to a provision similar to that contained in the Illinois Statutes, the Supreme Court of Pennsylvania said, in the case of the *City of Allentown v. Grim*, 109 Pa. St. 113, at p. 115:

"When the ordinance is approved it need not be returned to councils, for upon approval it becomes a law." Further citation of authority is unnecessary, the law being clear that when an ordinance of the City of Chicago, has passed from the control of the enacting legislative body to

the mayor for the purpose of receiving his consideration, and he has acted affirmatively by approving and signing the same, such ordinance at once becomes a law and takes effect, in the parliamentary sense, so as to foreclose further consideration by the Council except upon the presentation of a repealing ordinance for its action. It is also obvious upon well-settled principles of jurisprudence so familiar as to need no citation, that any Council rule which would seem to confer a right of reconsideration other than by repeal, after the signature of the mayor, would be in direct contravention of the statute law of this state and entirely without effect under such circumstances.

Yours very truly,

GEO. E. CHIPMAN,

First Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Illinois Central Railroad Company Slip.

March 11, 1916.

HON. W. R. MOORHOUSE, Commissioner of Public Works.

Dear Sir:

Replying to your letter of January 11, 1916, with which you transmitted letter from the Illinois Central Railroad Company, dated January 10, 1916, requesting a permit to close and fill Slip "E" on the Lake Front north of the line of Randolph street produced eastwardly, also blueprint showing location of the slip and letters from the Consumers Company to the president of the Illinois Central Railroad Company, dated December 22, 1914 and from the Western Cold Storage Company to Mr. Markham, dated December 10, 1914, on this subject, all of which are returned herewith, we beg to advise you that in our opinion you may properly issue such permit containing the provision that it is granted without prejudice to the rights of the City of Chicago, the State of Illinois or

the United States of America. The slip in question was directly or indirectly the subject of litigation in the cases of *State v. Illinois Central Railroad Company*, 16 Fed. 881, 33 Fed. 730; *Illinois Central Railroad Company v. Illinois*, 146 U. S. 387; *State ex rel. Attorney General v. Illinois Central Railroad Company*, 91 Fed. 955 and *Illinois v. Illinois Central Railroad Company*, 184 U. S. 77. The decree in the United States Circuit Court, entered May 26, 1896, in the suit of *People ex rel. Attorney General v. Illinois Central Railroad Company*, in pursuance to the mandate of the Supreme Court of the United States, reads in part as follows:

“The said cause came on to be heard at this term upon the said evidence, and other proceedings in the cause, including the stipulations made and the evidence taken and filed herein prior to the said former decree; and was argued by counsel; and thereupon, in consideration thereof, it is found and adjudged by the court that the said piers and docks referred to in the aforesaid judgment and mandate of the Supreme Court and there described as piers marked 1, 2 and 3, near Chicago river, and the piers and docks constructed by the said railroad company in front of the shore between Twelfth and Sixteenth streets, all in the City of Chicago, in the State of Illinois, do not extend, nor does either of them extend, into the lake beyond the point of practical navigability, having reference to the manner in which commerce in vessels is conducted on the lake.

“It is therefore ordered, adjudged and decreed that the title and possession of the said Illinois Central Railroad Company to the said piers and docks, and each of them and every part thereof, be, and the same is hereby affirmed.”

We assume for the purposes of this opinion that the slip which the railroad company is now asking permission to close and fill is one of the docks referred to in this decree.

Very truly yours,

GEORGE E. CHIPMAN,

First Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Refunding Fine of City Employee.

March 11, 1916.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

We have your letter dated February 26th, in which you request an opinion as to the city's standing in reference to the claim of Mark I. Sheridan, Assistant General Meter Foreman of the Department of Public Works, for refund of a fine imposed upon him in the Municipal Court on January 28th, for permitting, while he was engaged in city business, his auto, used in city service, to remain on Michigan avenue in violation of city ordinances.

We beg to advise you that if this case may properly be considered one where the city is under a moral obligation to compensate an employe for loss sustained or services rendered in the city service, the City Council may properly appropriate money for such purpose.

Bailey v. Pennsylvania, 167 Pa. St. 569.

; *State v. St. Louis*, 174 Mo. 125.

McQuillin on Munic. Corp., Vol. 5, Sec. 2168.

While it is unlawful for the City Council to appropriate money which is a mere donation of public funds, the above authorities, and others that might be cited, sustain the proposition that if the city is under a moral obligation to make the payment thus provided for the appropriation will be legal.

The question whether in any case a moral obligation exists is one dependent upon the circumstances of the particular case and is one of fact rather than of law. We suggest our own opinion, however, that it would seem extremely doubtful whether the city could properly be considered to be under a moral obligation to make an appropriation for the purpose under consideration, in view of the fact that the loss for which reimbursement is asked resulted from a violation of the city ordinances, and we, therefore, advise that the claim be placed on file.

Very truly yours,

RALPH G. CRANDALL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTTELSON,

Corporation Counsel.

Free Transportation of Policemen on Street Railway Lines When Not in Uniform.

March 15, 1916.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

Your letter of December 10, 1915, calls for an opinion upon the question of whether a member of the detective division of the Police Department, who is provided with a badge as the insignia of his authority, is entitled to ride free of charge upon the street railways if he displays his badge to the conductor before entering the car. The ordinances relative to the various elevated railroad companies in the city upon this subject are substantially the same and provide that policemen in uniform may be permitted to ride free of charge. The ordinances of the street railway companies provide that policemen may ride free of charge when in "full uniform." The determination of the question here involved simmers down to a construction of the word "uniform," *i. e.*, what did the Council intend when it provided for free transportation for policemen in uniform. The Century Dictionary defines "uniform" as follows:

"UNIFORM—A *dress of the same kind, fabrics, fashion, or general appearance* as others worn by members of the same body whether military, naval, or any other, by which the members may be recognized as belonging to the particular body: *opposed to plain clothes* or ordinary *civil dress*; as, the uniform of a soldier, a sailor, or a policeman."

Section 1925 of The Chicago Code of 1911 provides that the general superintendent of police shall have authority to prescribe an appropriate uniform and badge to be worn by men of the department. The fact that the words "uniform and badge" were used in this ordinance indicates that they were not regarded as one and the same by the Council.

In the Street Car Ordinances the provision is that no person except employes of the company, policemen and firemen, respectively in full uniform, shall be permitted to ride

upon any street railway without the payment of fare. There is a proviso in this same ordinance to the effect that employes of the company, when wearing an official badge of the company, conspicuously in view, may be permitted to ride free, so that in this very ordinance the Council made two provisions for employes of the company, one where the employes were in full uniform and one where the employes were wearing a badge of the company, indicating that the word "uniform" was used as describing the dress of the wearer.

We regard the word "uniform" as defined by the Century Dictionary to be the uniform meant by this ordinance, *i. e.*, the dress of the wearer, and we are, therefore, of the opinion that a police officer in plain clothes, even though wearing a star, is not entitled to ride free of charge under the ordinance in question.

Very truly yours,

DONALD P. VAIL,

Assistant Corporation Counsel.

Approved: -

SAMUEL A. ETTELSON,

Corporation Counsel.

Workmen's Compensation Act as Applied to Contractors Doing City Work.

March 15, 1916.

EDWARD J. GLACKIN, Esq., Secretary, Board of Local Improvements, City Hall.

Dear Sir:

We have your letter requesting an opinion "on the subject of requiring contractors doing city work to insure their liability to pay compensation to their employes under the provisions of the Workmen's Compensation Act." We note copy of opinion of the city attorney upon this subject, transmitted with your letter, and would respectfully submit the following:

That contracts for work done for the City of Chicago are governed both by the statutes and the ordinances of the City

of Chicago. If there were any doubt of the application of the provisions of Section 31 of the Workmen's Compensation Act to such contracts, such doubt would be removed by Section 2107 of The Chicago Code of 1911 as amended on March 24, 1913, appearing on pages 4238-39 of the Journal of Proceedings of the City Council of said date; and as amended March 30, 1914, appearing on page 4717-18 of the Journal of Proceedings of the City Council of said date, which reads in part as follows:

"In all contracts requiring the employment of workmen or laborers the contractor shall be required to insure to his employes or their beneficiaries the compensation provided for in the Act of the General Assembly of the State of Illinois entitled, 'An Act to promote the general welfare of the people of this state by providing compensation for accidental injuries or death suffered in the course of employment within this state; providing for the enforcement and administering thereof, and a penalty for its violation, and repealing an act entitled, 'An Act to promote the general welfare of the people of this state by providing compensation for accidental injuries or death suffered in the course of employment,' approved June 10, 1911, in force May 1, 1912,' approved June 28, 1913, in force July 1, 1913, and further to agree to indemnify, keep and save harmless the city from all claims, judgments, awards and costs which may in anywise come against said city by reason of any accidental injuries or death suffered by any of his employes in and about the performance of his contract.'"

Section 2110 of The Chicago Code of 1911 as amended on March 30, 1914, appearing on pages 4715-16 of the Journal of Proceedings of the City Council of said date, provides that all bonds given by contractors for the faithful performance of their said contracts with the city, shall contain a provision that said contractors shall insure their liability under the Workmen's Compensation Act.

We are of the opinion that the provisions of such sections of the code, herein referred to, are mandatory and must be complied with in all contracts for work done for the City of Chicago, regardless of the interpretation placed upon Section

31 of the Workmen's Compensation Act as to its application to the City of Chicago.

Respectfully submitted,

EDWARD H. WRIGHT,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Interpretation of Ordinance Relating to Retail and Wholesale Junk Yards.

March 15, 1916.

HON. VINCENT S. ZWIEFKA, Alderman, 16th Ward, No. 1357
North Ashland Avenue, Chicago, Illinois.

Dear Sir:

We have your verbal request for an opinion relative to the proper interpretation to be placed upon Section 2267 of The Chicago Code of 1911. In complying with your request we wish to advise you as follows:

Whereas the language used is somewhat ambiguous, the same must be literally construed in such manner as to carry out the intent, which intent is clearly to restrict the location, establishing and the maintaining of junk yards, either retail or wholesale, within one hundred feet of any block or street used exclusively for residence purposes.

In our recent conversation, relative to the question here involved, you stated L. Karzen to be the owner of several lots, known as No. 1840 to No. 1842 North avenue, which said lots have a frontage and are located midway between Lincoln avenue and Girard street, or one hundred twenty-five feet from Lincoln avenue and seventy-five feet from Girard street. This location brings the lot in question within the prohibited distance, regardless of the fact that two-thirds of the buildings on both sides of North avenue are used for business purposes, Girard street being used exclusively for residence purposes.

Therefore, if the facts be as represented by yourself, a

junk yard cannot be maintained at the contemplated location. We are further of the opinion, that this particular section of the code, while not specifically distinguishing between junk stores and junk yards, contemplates wholesale yards as well as retail yards, a wholesale yard being equally as great a menace to public health as a retail yard, and the municipality may exercise the same prerogative in the control of one as in the other.

Very truly yours,
HARRY L. BRIN,
Assistant Corporation Counsel.

Approved:
SAMUEL A. ETTIELSON,
Corporation Counsel.

Appropriation for the Transportation of Garbage.

March 17, 1916.

HON. WM. R. MOORHOUSE, Commissioner of Public Works.

Dear Sir:

Your communication of recent date, addressed to the corporation counsel, wherein you state that the contract awarded to the Chicago River Transfer Company will require the expenditure of \$28,440 and that the City Council has appropriated under Department of Public Works Account 204-T-50 "Impersonal services and benefits" the sum of \$7,110, and has appropriated under Department of Health Account 37-X-95 "For equipment, for transportation and final disposition of garbage" the sum of \$63,000, and request to be advised what is necessary to insure uninterrupted service in the transportation of the garbage, has been referred to me, and in reply I beg to say:

Sections 1 and 2, paragraphs 623 and 624, Chapter 24 of Hurd's Revised Statutes of 1913, read as follows:

"623. IN CITIES HAVING MORE THAN 100,000 INHABITANTS—NOT EXCEEDING FIVE YEARS.) §1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That any city having a population

of more than one hundred thousand inhabitants, as shown by any school census or by the federal census, shall be and hereby is authorized and empowered to make contracts for more than one year and not exceeding five years, relating to the collection and final disposition of garbage and ashes.

“624. CITY COUNCIL TO MAKE ANNUAL APPROPRIATION.) §2. Whenever any city shall make any such contract as is authorized by this act, it shall be and is hereby made the duty of the City Council of such city to include in the annual appropriation ordinance of each current fiscal year, an appropriation of a sum of money, sufficient to pay the amount, which under and by the terms of any such contract, shall become due and payable during such current fiscal year.”

The question hinges on whether the said contract is a valid contract, and under the ruling of the corporation counsel's office it has been held that the contract entered into by the city with the Chicago River Transfer Company was a valid contract, and therefore, an interpretation of Section 2 makes it the duty of the City Council to include in the annual appropriation ordinance of each current fiscal year an appropriation of a sufficient sum of money to pay the amount which will become due during the current fiscal year whenever the city makes a contract in accordance with the provisions of this statute.

The accounts of 204-T-50 and 37-X-95 are distinct and separate accounts, but Section 2a of Article VII of the Cities and Villages Act, as amended at the special session of the 49th General Assembly, authorizes the transfer of funds appropriated for one corporate object to another corporate object at any time after the first half of the current fiscal year, and reads as follows:

“§2a. The city council of cities, and boards of trustees in villages having a population of one hundred thousand or more, shall, at any time after the first half of each fiscal year, have power, by a two-thirds vote of all the members of such body, to make transfers within the department or other separate agencies of the municipal government, of sums of money appropriated for one

corporate object or purpose to another corporate object or purpose.”

The City Council having failed to make an appropriation of a sufficient sum of money to pay the amount of the existing contract with the Chicago River Transfer Company, it will be necessary for the City Council to pass an additional or supplemental appropriation ordinance, which may be done at any time within the first half of the current fiscal year by a two-thirds vote of all the members of the City Council.

Very truly yours,

CHARLES E. PEACE,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Withdrawal of Frontage Consents.

March 21, 1916.

HON. CHARLES BOSTROM, Building Commissioner.

Dear Sir:

Replying to your request of March 20, 1916, with reference to the right of persons who have signed a frontage consent petition for a permit to erect a one-story garage on the rear of premises known as 6529 Ingleside avenue, to withdraw such consent, will state that our Supreme Court in the case of *Theurer v. The People*, 211 Ill. 296, decided that the act of signing such petition is not an irrevocable act, and the petitioner may exercise on his own motion the right to withdraw his signature, providing the revocation is made before the body authorized to act has done so relying upon the genuineness of the petition and its signers. This decision follows the one set forth in the case of *Little v. The Board of Supervisors*, 198 Ill. 205, and other decisions of our state courts.

I am of the opinion that a party signing the frontage consent petition required by the ordinance before a public

garage may be erected, may withdraw that consent at any time before the petition for such consent has been formally acted upon and the permit granted.

In this case presented by you, the frontage consent was filed at the time the plans for the garage were submitted, and the frontage consent petition, being verified by the City Map Department, approved and, meeting the requirements of the city ordinances, was acted upon by the building commissioner in good faith and a permit issued. The owner of the property, relying on the permit issued and the approval of plans for construction, having commenced the construction of the building, thereby incurring considerable expense, is now in a position where he can enforce the rights acquired thereunder.

The petitioners who have signed the frontage consent for the permit to erect the aforesaid building are not permitted to change their position to the detriment of the owner of said building unless their signatures were secured through fraud, duress or in some other illegal manner, and this question is one for the courts to determine and beyond the jurisdiction of the building commissioner.

Respectfully submitted,

JOHN V. CLINNIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Suggestions Concerning Franklin-Orleans Street Bridge from Chicago Surface Lines.

March 22, 1916.

HON. WM. R. MOORHOUSE, Commissioner of Public Works,
Chicago, Illinois.

Dear Sir:

We are in receipt of your letter of recent date in which you call attention to certain things mentioned with reference to the proposed Franklin-Orleans Street Bridge Ordinance, in

a communication from Mr. Charles M. Haft, Special Attorney for the Chicago Surface Lines, and ask for our opinion with regard to same.

Mr. Haft points out two matters which he appears to regard as subject to objection. The first point made is that at the conclusion of paragraph 1 of Section 3 there is a provision to the effect that all public utility companies which have existing property that will be disturbed by the construction of the proposed improvement are required to assume the expense of alterations and to change same in order to conform to the new conditions.

We know of no valid objection that could be urged to such a provision. It is quite plain that when a public service corporation is awarded some special privilege or grant it is not to be understood as precluding the possibility of other public improvements which may in some measure require an alteration of plans or existing installations. No public service corporation acquires any such vested right as against the public.

General ordinances of the city in fact aim to meet such conditions. It will be found that, so far as wires are concerned, the permission to erect poles and string wires can only be granted upon condition that the same are to be removed whenever the City Council shall order such removal, and in other respects the right to regulate same under its police powers is strictly reserved to the city. The same is true with respect to other public utilities.

Concerning the rights of the Chicago surface lines, we are of the opinion that the whole matter is covered by provisions in their special ordinances. Thus, the traction ordinances passed on February 4, 1907, each contains a provision in Section 8 whereby the city shall have the right by ordinance to require the company to remove any tracks or portions thereof the further maintenance of which may no longer be warranted by the traffic, and in Section 35 there is an express reservation of police powers. The two sections read together undoubtedly reserve authority to the city to require such changes as may be necessary in order to make the improvement provided for in the proposed ordinance. In any

event, it cannot be assumed that because certain rights are granted in the streets as they now exist that these rights will operate to prevent the construction of a great improvement merely because the companies having such rights will be required to change the existing properties to a slight degree though not to an extent which will affect the grants under which they operate.

The other point which Mr. Haft makes is that Section 18 of the proposed ordinance, which provides that the terms of any general ordinance heretofore or hereafter passed relating to the method of construction or maintenance of viaducts shall not relate to or have effect as to the viaduct in question, prevents the city from passing any general ordinance at any future time relative to the maintenance of this viaduct and the approaches.

The section in question was discussed very fully with the representatives of the railway company by the writer, and the committee which had in charge the drafting of the ordinance also considered the meaning and purport of same. It is well recognized that the city cannot divest itself of its police powers by means of a contract or an ordinance granting privileges which is in the nature of a contract. The most that can be done in the way of limiting the powers of the city by such a provision in a contract ordinance is to prevent the city from passing any general ordinance which would require material structural changes in the future.

The section as it stands must be regarded as a provision modifying the present general ordinance relating to the construction of viaducts. It is to be assumed that so far as the work of construction is concerned, all of which is subject to the approval of the commissioner of public works, the same will conform to the general ordinance now in force in all respects where there is not a specific provision which departs therefrom. It further contemplates that after the viaduct is once constructed it shall be maintained as constructed without reference to changes in the general ordinance relating to construction and maintenance of viaducts. The city does not and can not by such a provision divest itself of the right to require by general ordinance any change that may be made

necessary in the future in order to promote the safety, health, comfort or convenience of the public. Such being the case, there does not seem to be anything in the section which affects the rights of the parties represented by Mr. Haft or the public generally. It takes away no substantial right from the municipality and is to be construed only as fixing the manner of constructing the proposed viaduct and the maintenance of same as a permanent structure.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Method of Measuring Distance from Church.

March 23, 1916.

HON. CHARLES BOSTROM, Commissioner of Buildings.

Dear Sir:

We are in receipt of your favor of March 10, 1916, asking for an opinion from this department as to what is the method of measurement from the synagogue located at the southwest corner of 46th street and Grand boulevard, to the proposed theater site in same block; and whether "the distance is to be figured from the south line of the synagogue property or from the south line of the synagogue proper."

From a plat in our possession, we find that the temple in which the synagogue is housed, stands on a lot extending 194 feet south of South 46th street on Grand boulevard; that south of the south line of the 194 feet there is another building known as the "Sinai Social Center." This latter building is erected on a 100-foot lot south of the 194 feet upon which stands the Sinai Temple. These two buildings are connected at the rear or west end by a narrow structure containing an enclosed walk from one building to another, with the heating plant for both the church and the social center located in the basement.

Commencing with 100 feet south of the south line of the lot upon which the social center now stands, it is proposed to erect a theater.

Paragraph (a) of Section 117 of The Chicago Code of 1911 prohibits the carrying on of entertainments:

“Within 200 feet of any hospital, church or building used exclusively for educational purposes; said distance to be measured between the nearest point in any boundary line of the place within which it is proposed to produce, offer, present or carry on such entertainment and the boundary line of the lot on which such hospital, church or building used exclusively for educational purposes is located.”

It is manifest that the terms “hospital, church or building” for the purposes of the 200-foot rule refer to the building or edifice.

The Century Dictionary defines “church” to be—

“1. An edifice or a place of assemblage specifically set apart for Christian worship.

“2. An edifice dedicated to any other kind of religious worship; a temple. (Rare.)”

Bouvier’s Law Dictionary defined “church” to be—

“A place where persons regularly assemble for worship.”

“Synagogue” is defined in the Century Dictionary as—

“1. An organization of the Jews for the purposes of religious instruction and worship.

“2. The building where such instruction and worship are maintained.”

The modern church, temple or synagogue has in many instances, particularly in large cities, extended its activities beyond that of public worship. Much social, educational and so-called institutional work has been undertaken and prosecuted with most gratifying and beneficial results. It is generally recognized, however, that such lines of service, while undertaken chiefly for the ultimate purpose of bringing the beneficiaries thereof under the religious influences of the church or synagogue would in many respects constitute a separate field from the distinctively religious services of the church.

The building known as the "Sinai Social Center," which is constructed and stands upon a lot separate and apart from the synagogue proper, is used as a gathering place or assembly hall for "social, educational, cultural and civic services for the Jewish community of Chicago." Under its roof at various times in the propagation and prosecution of the objects of a social center there have been held various forms of amusements, such as dances, athletic exhibitions, games and various other activities with the object in view of bringing together in a closer community of social interest "Jews of all nationalities, regardless of material or social standing."

On several occasions and very often, in fact, I understand it is the rule at some of these functions or activities, to make a charge of admission. The money collected thereby is spent in various ways. Little, if any of it, however, is spent towards the maintenance of the social center or the temple itself.

The question first arises as to whether or not the building known as the social center comes within the classifications of buildings used exclusively for educational purposes. In arriving at my conclusions, I have before me a pamphlet issued by the Sinai Social Center, entitled, "Tentative Program, 1914-1915," publishing the aims and purposes of the organization, which are as follows:

"Its aim and purpose is to provide a Jewish social, educational, cultural and civic center for the Jewish community of Chicago, where young and old, parent and child, Jews of all nationalities, regardless of material or social standing, can meet and find themselves in a truly Jewish atmosphere, radiant with the Jewish spirit, re-awakening in the Jew an historic consciousness, reviving in the home the beautiful old Jewish family life and instilling in the youth a love for and appreciation of the old Jewish virtues in manhood and womanhood; in short, a place where might be inaugurated a true renaissance of things Jewish."

I also have before me several paper programs and postal cards for various affairs held at the Sinai Social Center, showing diversity of entertainment at all of which it appears a charge is made. Can it be said that the building occupied

by the social center is used exclusively for educational purposes in view of the very programs and in view of the definitions of the words "exclusive," "social" and "educational?"

The Century Digest defines the word "exclusively" as—
 "Pertaining to the subject alone; not including, admitting or pertaining to any other or others."

Webster's Dictionary defines the word "educational" as follows:

"Of or pertaining to education."

The term "social," as defined in the Century Dictionary, is described as a condition—

"Of or pertaining to society, or to the community as a body; as, social duties, interests, usages, problems and questions."

In view of the foregoing definitions and the objects and purposes of the Sinai Social Center, I am of the very decided opinion that the building occupied by and known as the Sinai Social Center, does not come within the purview of the section of the ordinance prohibiting the erection or maintenance of places of amusements within 200 feet of the boundary line of the lot on which such hospital, church or building used "exclusively for educational purposes" is located.

In the case of *St. Edwards College v. Morris*, 17 S. W. 512, 82 Tex. 1, the Supreme Court of Texas there held:

"Land owned and used by the proprietor of a private school in such a manner as to enable him to conveniently and cheaply supply the table of a boarding house kept by him for pupils, though contiguous to and immediately connected with land used exclusively for school purposes, is not property used for school purposes, within the meaning of Const. Tex. Art. 8, Par. 2, empowering the Legislature to exempt from taxation all buildings used exclusively and owned by persons for school purposes."

To the same effect, see *Monticello Seminary v. Board of Review*, 249 Ill. 481. In that case the Supreme Court, in passing upon the question as to whether or not the institution could exempt itself from taxation on its bonds and se-

curities on the ground that it was solely an educational institution, even where the profits were invested in the institution, said :

“The fact that the rents and revenues of property are devoted to school purposes does not exempt the property from taxation, the property itself must be directly used for school purposes before it is entitled to be exempted.”

See also :

Monticello Seminary v. Board of Review, 242 Ill. 477.

San Antonio v. Seeley, 57 S. W. 688.

Red v. Johnson, 53 Tex. 284.

People v. Dalton, 30 N. Y. Sup. 407.

In Re Zinzon, 43 N. Y. Sup. 714.

The next question to be determined is whether or not the provision in the ordinance prohibiting the production or presentation of entertainments mentioned in the twenty-one classes under Section 110 of The Chicago Code of 1911 within 200 feet “of any hospital, church or building used exclusively for educational purposes; said distance to be measured between the nearest point in any boundary line of the place within which it is proposed to produce, offer, present or carry on such entertainment, and the boundary line of the lot on which such hospital, church or building used exclusively for educational purposes is located,” refers to and applies to the particular lot upon which such building used exclusively for educational purposes is located; or does it refer to the ground upon which such building is located and surrounding the building?

In order to determine the intention of the City Council in the provision affecting the erection of places of amusement within 200 feet of any lot upon which a building used exclusively for educational purposes is located, it becomes necessary to compare them with some other provisions referred to in prohibitions as to the erection of other buildings such as garages, etc.

Section 2684 of The Chicago Code of 1911, affecting the construction and erection of garages, contains the following language:

“* * * and it shall not be lawful for any person, firm or corporation to locate, build, construct, or maintain any garage within 200 feet of any building used as a hospital, church or public or parochial school, or the grounds thereof.”

It is very evident from the language used in the foregoing section of the code that the City Council had in mind the prohibition of garages within 200 feet from any part of the ground upon which the building may be located. This interpretation was sustained by the Supreme Court in the cases of *Harrison v. The People*, 222 Ill. 150, and *Krotzmann v. Dunne*, 228 Ill. 31. In both of the foregoing cases, the prohibited territory was to commence from the ground upon which any school or hospital was located. In the ordinance in question, however, namely, Section 117 of The Chicago Code of 1911, the prohibition applies to the lot upon which such building used for educational purposes exclusively is located and not from the ground.

The Century Digest defines the word “ground” as follows:

“Land appropriated to individual ownership or use
* * * The land immediately surrounding or connected with the dwelling house or other building and devoted to its uses; commonly in the plural.”

“A limited part of the earth’s surface; a space or tract of country; a region.”

The same dictionary defines a lot as being:

“Any distinct part or parcel * * * a portion or parcel of land; any piece of land divided off or set apart for a particular use or purpose; as, building lot.”

In the case of *Kansas City E. & S. Railroad Co. v. Merrill*, 25 Kans. 421-423, the court, in passing upon the definition of a lot of land, in its opinion said:

“In the general acceptance of the words, ‘a lot of land,’ is a separate portion belonging to one person, according to Webster, ‘that portion of land which is allotted or assigned to anyone, and hence any distinct portion of land.’ As used in the statute limiting the powers

of commissioners appointed to fix a compensation for land taken by a railroad for condemnation proceeding to a particular quarter section or other lot of land, the term is not restricted to a subdivision less than a quarter, but may include a section lying in one body and owned by one person.”

In the case of *Ontario Land & Imp. Co. v. Bedford*, 27 Pac. 39, 90 Cal. 181, the court, in passing upon the definition of a lot, in its opinion said :

“Lot, as used in a conveyance, may mean the entire premises conveyed whether such premises consist of a farm or even a block in the city, but the ordinary meaning of the word, when used in reference to town or city property is a subdivision of one block, according to the plat or survey of such town or city. As used in the mortgage of property, part of which only was platted in such lots, the rest being merely platted in blocks, the mortgage providing that the mortgager should be entitled to a partial release of the mortgage on payment of a certain sum for each ‘lot’ released, it only includes the lots which have been platted as such and does not include those blocks which have not been subdivided into lots.”

From an official plat in the Map Department, I found that the particular ground upon which the Sinai Temple and the social center buildings are located have been divided into city lots. The temple proper wherein the religious services are held stands upon two lots, the first of which commencing at the southwest corner of 46th street and Grand boulevard is 94 feet in width, and the second is 100 feet in width. The social center stands in the center of a lot 100 feet in width. Immediately south of this building there are two lots 50 feet each in width and then there is that portion of the land upon which this proposed theater site is to be erected.

Considering the definition of the word “lot” and its application to it, lots and parcels of land platted as defined in the cases and defined in the various dictionaries, I am of the opinion that the measurements affecting this particular instance should commence from the nearest point of the lot upon which the temple is located or such building as is used exclusively for educational purposes.

As I have stated before, the social center can not be considered to be a building used exclusively for educational purposes, and in view of the fact that the respective buildings are located upon ground that has been platted into city lots, the only construction that can be placed upon the particular section in question is that the measurements should commence from the lot and not the ground upon which the Sinai Temple is built and located. That being true, the measurements show that the proposed theater is to be erected upon a lot 200 feet removed from the lot upon which the Sinai Temple is located measuring it in a straight line, and for that reason the proposed theater would be outside of the prohibitions of Section 117 of the Chicago Code, and the permit would therefore have to be issued upon the application properly filed in your department.

Respectfully Submitted,
 DAVID T. ALEXANDER,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Contract of the Ahrens-Fox Fire Engine Co.

March 25, 1916.

HON. THOMAS O'CONNOR, Fire Marshal.

Dear Sir:

We herewith return contract with The Ahrens-Fox Fire Engine Co., proposal of said company, specifications and certain correspondence concerning delivery of automobile combination pumping engine and hose wagon submitted with your letter of March 22nd, in which you ask for an opinion upon the question of liquidated damages for failure of the contractor to deliver said engine and hose wagon within the time fixed in the contract.

The contract contains a clause specifically requiring the contractor to deliver the engine and hose wagon within one hundred working days from July 19, 1915, which would have been not later than November 12, 1915.

We have examined the printed proposal of The Ahrens-Fox Fire Engine Co., upon the second page of which, at the top of same, there appear these words:

“Agreements are contingent upon delays from causes beyond our control.”

We do not believe that this clause can be construed to be a part of the contract and to exempt the contractor from the damage liability because the contractor was delayed through labor strikes.

In the case of *Summers v. Hibbard & Co.*, 153 Ill., 102, the contractor attempted to avoid paying damages because at the top of his letterhead there were printed the words:

“All sales subject to strikes and accidents.”

The court in determining this question, used the following language:

“It is insisted by appellants that the words, ‘All sales subject to strikes and accidents,’ printed at the top of their letterheads, must be considered in determining what the contract was, and that said words constituted an express condition that became a part of the contract between them and appellees. We do not so understand the case. * * * The mere fact that appellants wrote their acceptance on a blank form for letters, at the top of which were printed the words, ‘all sales subject to strikes and accidents,’ no more made those words a part of the contract than they made the other words there printed, ‘Summers Bros. & Co., Manufacturers of Box-annealed Common and Refined Sheet-Iron,’ a part of the contract. The offer was absolute. The written acceptance which they themselves wrote was just as absolute. The printed words were not in the body of the letter or referred to therein. The fact that they were printed at the head of their letterheads would not have the effect of preventing appellants from entering into an unconditional contract of sale.

“In *American Express Co. v. Pinckney*, 29 Ill. 392, this court said: ‘In a case where the agreement is partly written and in part printed, the preference is always given to the written part.’ In that case the printed matter was in the body of the instrument, incorporated and mingled with the written matter. It would seem there is more reason and occasion for applying the principle

of law there invoked in a case where, as here, the words in print are separate and apart from the writing that appears upon the paper, and in a place where one would not be likely to look for limitations upon that which is written. *People ex rel. v. Dulaney*, 96 Ill. 503, is to the same effect as the case above cited.

“When an instrument is in part written and in part printed, and these parts are apparently inconsistent, or there is a reasonable doubt upon the sense and meaning of the whole, the words in writing will control, because they are the immediate language and terms selected by the parties themselves for the expression of their meaning. (*Alsagu v. St. Katherine's Dock Co.*, 14 M. & W. 796, and *Robertson & Thomasson v. French*, 4 East, 360, both cases cited with approval in *Express Co. case, supra.*) In the case at bar it is inconsistent that the contract should be both an absolute contract and a conditional contract. * * * But even if the contract has been for sheet-iron of their own manufacture, the breakages in this mill would not have relieved them from liability. The general doctrine is, that where parties, by their own contract and positive undertaking, create a duty or charge upon themselves, they must abide by the contract and make the promise good, and either do the act or pay the damages. (*Steele v. Buck*, 61 Ill. 343; *Dehler v. Held*, 50 *id.* 491; *Bunn v. Prather*, 21 *id.* 217.) Inevitable accident affords them no relief, for they are regarded as insurers to the extent of making good the loss. * * *

The principle enunciated by the court in the foregoing case is further sustained in *Ludlow Valve Mfg. Co. v. City of Chicago*, 181 Ill. App. 394, and *Parker-Washington Co. v. Chicago*, 267 Ill. 136.

Our conclusion from the examination made of the contract and the authorities hereinabove cited, is that the liquidated damages shown to be due from November 12, 1915, up to the date of the delivery of the engine and hose wagon in question cannot be remitted by the City of Chicago.

Yours very truly,

EDWARD H. WRIGHT,

Assistant Corporation Counsel.

Approved:

GEORGE E. CHIPMAN,

First Assistant Corporation Counsel.

Fine for Employing Unlicensed Plumber.

March 27, 1916.

MR. VERNON L. BEAN, Secretary, Board of Examiners of Plumbers, City Hall.

Dear Sir:

We are in receipt of your letter *in re* whether the City of Chicago has power to pass an ordinance imposing a fine on property owners or persons charged with the care and maintenance of buildings for engaging an unlicensed plumber to do any work in and about the property under their care and also attached letter from the Chicago Master Plumbers' Association covering the same matter.

The power of the City of Chicago over the conduct of the business of plumbing is governed by an act of the Legislature known as "An Act to provide for the licensing of plumbers and to supervise and inspect plumbing," approved June 10, 1897, and in force July 1, 1897. This act provides in Section 1:

"Any person now or hereafter engaging in or working at the business of plumbing in cities or towns of 5,000 inhabitants or more in this state, either as a master plumber or employing plumber or as a journeyman plumber shall first receive a certificate thereof in accordance with the provisions of this act."

Section 2 provides:

"Any person desiring to engage in or work at the business of plumbing either as a master plumber or employing plumber or as a journeyman plumber shall make application to a board of examiners hereinafter provided for and shall at such time and place, as said board may designate, be compelled to pass such examination as to his qualifications as said board may direct. * * *"

Section 3 provides for the creation of a board of examiners in each town or village of ten thousand inhabitants or more.

Section 4 provides for meeting of the board of examiners, scope of examination, certificate of qualification and fee for examination.

Section 5 provides:

“Each city, town or village in this state having a system of water supply or sewerage shall, by ordinance or by-law within three months of the passage of this Act *prescribe rates and regulations for the materials, construction, alteration and inspection of all plumbing and sewerage placed in or in connection with any building in such city, town or village*, and the board of health or proper authorities shall further provide that no plumbing work shall be done except in case of repairing leaks without a permit being first issued therefor, upon such terms and conditions as such city, town or village shall prescribe.”

Section 6 provides for the procuring of certificates.

Section 7 provides:

“Any person violating any provision of this act shall be deemed guilty of a misdemeanor and be subject to a fine of not less than \$5.00 nor exceeding \$50.00 for each and every violation thereof and his certificate may be revoked by the board of health or proper authorities of said city, town or village.”

The foregoing act and Paragraphs 66 and 78 of Section 1 of Article V of the Cities and Villages Act embrace the whole power of the City Council over the subject of plumbing, and any ordinance passed pertaining to the business of plumbing must have some substantial relation to them and be in furtherance of the purpose contemplated therein; that is, it must have some tendency to promote the public health, morals, security, comfort and welfare or to suppress disease.

Section 5 of the act of the Legislature providing for the licensing of plumbers and the supervision and inspection of plumbing, is as follows:

“Each city, town or village in this state having a system of water supply or sewerage shall, by ordinance or by-law within three months of the passage of this act prescribe rules and regulations for materials, constructions, alteration and inspection of all plumbing and sewerage placed in connection with any building in such city, town or village and the board of health or proper authorities shall further provide that no plumbing work shall be done except in case of repairing leaks without

a permit being first issued therefor upon such terms and conditions as such city, town or village shall prescribe.”

This section is so comprehensive in its scope as to embrace the authority contemplated in the proposed ordinance.

We are of the opinion, therefore, that an amendment to the plumbing ordinances imposing a fine on property owners or persons charged with the care and maintenance of buildings for engaging an unlicensed plumber to do any work in or about the property under their care would be valid.

Very truly yours,

GEORGE A. CURRAN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Refund for Payments Made to Clerk of Municipal Court.

March 29, 1916.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

Replying to your letter in which you enclose letter from Messrs. Ferguson & Goodnow, in reference to claim by reason of payment of appearance fee which they claim should be refunded, we beg to say that this office advised the city comptroller under date of September 9, 1913, as follows:

“During the past few weeks several refund certificates from the clerk of the Municipal Court have been handed me by Mr. O'Connor of your department for an opinion as to whether or not the same should be honored and paid by the city.”

“There seems to be prevalent an impression that moneys paid to the Municipal Court by mistake of fact may properly be refunded upon order of the clerk of the Municipal Court. I deem it advisable therefore to restate the position of this office on this matter.

“Fees paid the clerk of the Municipal Court are not deposits, but are prerequisite payments provided for by the statute to be paid before the services of the court

can be obtained. Upon such payment the court must perform such services as the party making payment is entitled to, if it can, and this the court must ever hold itself ready to do. Costs paid voluntarily cannot be recovered back because of a mistake of law or fact by the party paying or the party paid.

Powell v. Bunger 79 Ind. 468.

Thompson v. Doty, 72 Ind. 336.

Clague v. Hodgson, 16 Minn. 291.

Bobb v. Dillon, 20 Mo. App. 309.

“I am also submitting herewith a list of authorities pertaining to the question of refunding license fees which hold that voluntary payments to a municipality cannot be recovered.

“I desire therefore to advise you that no municipal court costs should be refunded which have been paid voluntarily.”

We see no reason to modify the opinion quoted above.

Yours very truly,

GEO. E. CHIPMAN,

First Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTIELSON,

Corporation Counsel.

Renting of Property of City.

March 29, 1916.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

We are in receipt of yours of March 15, in which you direct our attention to an apparent conflict in responsibility under the power conferred by the Municipal Code upon the comptroller, commissioner of public works and Bureau of Compensation relative to renting property where the city appears either as lessee or lessor, and in which you ask the question as to the duties and responsibilities in regard to leasing property now in charge of the Bureau of Compensation,

and as to the authority of the Bureau of Compensation and the commissioner of public works to execute leases for the city. We have been unable to find any conflicts as to such authority.

In your communication you refer to Section 36, Page 9, of The Chicago Code of 1911, which reads as follows:

“36. LEASING OF REALTY—APPRAISERS.) Said comptroller is authorized to execute any and all leases of real property to which the city may be a party, either as lessor or as lessee, whenever he shall find it necessary to secure private property for the use of the city, or whenever it is deemed advisable that the property of the city should be leased; provided, that no lease to run for more than two years shall be executed without the special approval of the City Council.

“When provision for appraisers shall be made by a lease to which the city is a party, or in which it is interested, appraisers on behalf of the city shall be appointed by the mayor or comptroller, to determine the rent on renewal of the lease, or the value of buildings to be paid for on the expiration thereof.”

Under said section the comptroller is authorized to execute any and all leases as lessee or lessor for real property to which the city is a party (1) as lessee when it is necessary to secure private property for the city, and (2) as lessor when it is deemed advisable that the property of the city should be leased, provided the lease does not extend beyond the term of two years; if beyond two years, it shall not be executed without the special approval of the City Council.

You also refer in your communication to Section 24, page 7, of The Chicago Code of 1911, which is identical in part with Section 1376, page 984 of Jones & Addington's Ill. Stat. Ann. with reference to an act to provide for the incorporation of cities and villages, which is as follows:

“24. COMPTROLLER'S POWERS.) Said comptroller shall be charged with and shall exercise a general supervision over all the officers of the city charged in any manner with the receipt, collection or disbursement of the city revenues, and the collection and return of such revenues into the city treasury. He shall be the fiscal agent of said city, and, as such, shall have charge of all deeds, mortgages, contracts, judgments, notes, bonds, debts

and choses in action belonging to said city, except such as are directed by law or ordinance to be deposited elsewhere; and shall possess and carefully preserve all leases of the property of said city.

“He shall have supervision over the contracts, bonds, obligations, loans and liabilities of the city, the payment of interest, and over all the property of the city, and the sale or the disposition thereof; and he shall generally in subordination to the mayor and city council exercise supervision over all such interests of said city as, in any manner, may concern or relate to the city’s finances, revenues and property.”

Said Section 1376, so far as important in this connection, reads as follows:

“The city comptroller (if there shall be any city comptroller appointed, if not, then the clerk) shall exercise a general supervision over all the officers of the corporation charged in any manner with the receipt, collection or disbursement of corporation revenues, and the collection and return of all such revenues into the treasury. He shall have the charge, custody and control of all deeds, leases, warrants, vouchers, books and papers of any kind, the custody and control of which is not herein given to any other officer * * *.”

The commissioner of public works is an officer created by ordinance, as provided by statute, and under the above section the city comptroller can exercise a general supervision over the commissioner of public works as an officer when the commissioner is charged in any manner with the receipt, collection or disbursement of the city’s revenue and the collection and return of such revenues into the city treasury, and that general supervision would extend over the commissioner of public works when by order of the City Council the commissioner performs duties in reference to the leasing of property so far as it involves the question of receipts and disbursements of revenue connected therewith.

There is no statute or ordinance which vests a general power in the commissioner of public works to execute any lease to which the city is a party either as lessee or lessor, and said power can be conferred upon him only by an ordinance of the City Council.

In reference to the duties and responsibilities of the comptroller in regard to leasing the property in charge of the Bureau of Compensation, we quote Sections 2098, 2099 and 2100, page 660 of The Chicago Code of 1911, which read as follows:

“2098. BUREAU ESTABLISHED.) There is hereby established a bureau of compensation, which bureau shall be under the direction and control of the commissioner of public works.

“2099. DUTIES OF SUPERINTENDENT.) The superintendent of the bureau of compensation shall perform such duties as may be required of him by the commissioner of public works, and he shall act in an advisory capacity to the committee on compensation of the City Council and shall perform such duties as may be required of him by said committee.

“2100. SCOPE OF WORK—PERMITS.) Said bureau shall have charge of and receive all applications for permits to use streets, alleys, or public grounds, or any space beneath the same, and shall attend to all matters connected with the issuing of such permits.”

Under the above sections the Bureau of Compensation is in charge of a branch of the executive department of the commissioner of public works. The superintendent of compensation, who is not an officer of the City of Chicago, but is in charge of a branch of the executive department of the municipal government known as the Department of Public Works, shall perform such duties as are required of him by the commissioner of public works, and shall have charge of and receive all applications for permits to use the streets, alleys or public grounds or space beneath the same, and shall attend to all matters connected with the issuing of permits, but no power is conferred upon said superintendent to issue permits to use or lease the streets, alleys or public grounds of the city.

We are, therefore, of the opinion that no legal power is conferred upon the commissioner of public works or Bureau of Compensation to execute any lease relative to the renting of property of the city either as lessee or lessor, and that they could not so execute, unless by ordinance of the City Council first had and obtained, and if so authorized (except

when directed by statute to be deposited elsewhere) the comptroller would have charge of all leases entered into by the city, either by the commissioner of public works or the Bureau of Compensation.

Yours very truly,
BENTON F. KLEEMAN,
Assistant Corporation Counsel.

Approved:
SAMUEL A. ETTELSON,
Corporation Counsel.

Recovery of Goods to Which Lien Applies.

March 31, 1916.

MRS. LOUISE OSBORN ROWE, Commissioner of Public Welfare,
8th Floor, City Hall Square Bldg.

Dear Madam :

Replying to your letter of the 23rd instant in which you ask to be advised as to how persons whose effects are held for room rent, board or both, may obtain or recover the same by other means than replevying them, we accordingly beg to advise that hotel and boarding house keepers have a lien upon the baggage and other valuables of their guests or boarders for their accommodations, board and lodging, which effects may be detained until such charges have been paid, and unless paid within 60 days from the time that the same accrued, may be sold at public auction after giving 10 days' notice of the time and place of sale by a publication of such notice. In the event that a hotel or boarding house keeper should withhold unlawfully any effects of a guest or boarder, the same may be recovered in an action of replevin. Such suit can only be instituted upon the filing of a bond by the plaintiff for twice the amount of the value of the goods to be replevied. The cost of starting suit in the Municipal Court approximately amounts to about \$4.10. Upon satisfactory showing, leave may be obtained from the court, to sue as a poor person. We do not think it possible, however, to proceed without the filing

of a bond which must be either a real estate bond or a cash bond; if the latter, the minimum premium accepted by a surety company, would be about \$5.00. Cases of this nature are not returnable before the small claims court but are assigned to a branch which disposes of cases only of this nature, which as a rule, requires the services of an attorney to help the court in determining their proper disposition.

Trusting that the information which is herein contained answers the several questions which you have in mind, and assuring you of our further willingness to be of service, we respectfully remain,

Yours very truly,

HARRY L. BRIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Abandonment of Contract.

April 6, 1916.

HON. WILLIAM R. MOORHOUSE, Commissioner of Public Works, Chicago, Illinois.

Dear Sir:

We are in receipt of letter from the Great Western Smelting & Refining Company under date of March 27, 1916, advising this office that said company has elected to abandon the contract entered into with the city for furnishing and delivering two hundred and fifty (250) tons of pig lead, because of the failure on the part of the city to execute estimate for eighty-five per cent (85%) of the value of goods delivered and accepted as provided in the contract.

It appears that one hundred (100) tons of lead were delivered and accepted on January 19, 1916, and the contractor was dissatisfied because it had not received eighty-five per cent (85%) of the value of the material at the date of the writing of the letter. The contract provides that

estimates will be issued by the city for eighty-five per cent (85%) of the value of the material if the performance of the contract is satisfactory.

But the contractor was chargeable with notice that, under the law, the city could not enter into a binding contract and pay money under the same in advance of an appropriation to meet the expenditures incurred by the contract. The appropriation to meet the expense of the contract with the Great Western Smelting & Refining Company was passed by the City Council on March 31, 1916, which date was subsequent to the writing of the letter declaring its intention to abandon the contract by the contractor. The contract was not formally executed on the part of the city until after the passage of the appropriation.

If the contractor is to demand pay for the material delivered to the city it must do so under the terms and conditions of the contract.

In the case of *Roemheld v. City of Chicago*, 231 Ill. 467, the court said at p. 470-471:

“Where there is a statute or ordinance prescribing the method by which an officer or agent of a municipal corporation may bind the municipality by contract, that method must be followed, and there can be no implied contract or implied liability of such municipality. Where the agents of a city are restricted by law as to the method of contracting, the city cannot be bound otherwise than by a compliance with the conditions prescribed for the exercise of the power. (*School Directors v. Fogleman*, 76 Ill. 189; *Tamm v. Lavalle*, 92 *id.* 263; *Rogne v. People*, 224 *id.* 449.) The performance of work or furnishing material for a city and the acceptance of the resulting benefits will not render it liable to pay if the work was not authorized. The fact that the labor is beneficial will not create a liability.”

But the contractor can not rely on the contract to collect money due for material delivered and at the same time declare it rescinded for all other purposes at the date of its execution by the city.

Our conclusion, therefore, is that the Great Western Smelting & Refining Company cannot abandon its contract

except for cause arising after the execution of the contract by the city. If the contractor relies upon such contract for the payment of money due for material delivered to the city, it must stand ready to perform under the contract.

Yours very truly,

EDWARD H. WRIGHT,

Assistant Corporation Counsel.

Approved:

GEORGE E. CHIPMAN,

First Assistant Corporation Counsel.

Interference on Telephone Wires.

April 7, 1916.

HON. JOHN P. GARNER, Commissioner of Public Service.

Dear Sir:

I am in receipt of your letter of March 7th last, relative to interference of conversations by other parties on the same circuit while subscriber is legitimately using the line.

In answer thereto beg to state that you have set out three specific methods of disturbance.

First: Repeatedly moving the switch hook up and down.

Second: Placing the receiver to the mouth-piece of the transmitter to produce a howling sound.

Third: Talking into the transmitter.

In answer to your question as to what would constitute unwarranted use of a party line, I beg to state that any one of the above enumerated acts might be deemed to be an unwarranted use, and especially the second, for at no time during telephonic communication does it become necessary to place the receiver to the mouth-piece of the transmitter, and whenever it occurs, whether playfully or maliciously, it is an unwarranted use of the telephone instruments.

The moving of the "switch hook up and down" and "talking into the transmitter" are necessary acts and provided for by rule of the company and necessarily expected

of all persons who use the instruments, and only in such cases where it can be determined that these acts are mischievous or malicious can they be called unwarrantable acts.

In answer to your second question, as to what interference would constitute a breach of contract right between the offending subscriber and the telephone company, I beg to state that the rule of the company provides that:

“the lines and equipment on subscriber’s premises shall be carefully protected and used for lawful purposes where installed, and any breach of this rule with malicious intent could be used by the company as a reason for discontinuing the service to the offending subscriber.”

In answer to your third question, beg to state that it is hardly conceivable that the Department of Public Service would ever be required to exercise the police powers of the city to remove a telephone of an offending subscriber, inasmuch as the company, in the interest of itself and other subscribers, would be able to handle the situation in a satisfactory manner, and neither do I believe that the interference on any party line could ever be deemed a public nuisance, because of the limited number of persons in connection at any one time.

Very truly yours,

DANIEL A. ROBERTS,
Assistant Corporation Counsel.

Approved:

GEORGE E. CHIPMAN,
Acting Corporation Counsel.

Limiting Telephone Conversations.

April 7, 1916.

HON. JOHN P. GARNER, Commissioner of Public Service.

Dear Sir:

I have at hand your letter of March 18th, relative to the legality of limiting telephone conversations to five minutes.

In answer to your first question I beg to state that, I believe it was the intention of the framers of the Telephone

Ordinance of May 26, 1913, to make a unit of conversation and that the maximum length of time for said conversation is five minutes, on the basis of a charge of five cents per message.

Under paragraph (h) relative to neighborhood exchange service, being a paragraph of Section 2 of the Telephone Ordinance of May 26, 1913, it is said that the subscriber in "any such exchange (meaning neighborhood exchange), may communicate with *any telephone* located within the city limits outside of the local or neighborhood exchange and served by any of the exchanges of the company located within the City of Chicago by a message for which a charge of not more than five cents may be made for each period of five minutes or fraction thereof."

This clause is specific, and sufficient to show that the framers of the ordinance intended it to be the unit of time for conversation in this particular class of service. In the other classes of service, other than toll service (paragraph i), the rule of the company as shown on page 2 of the telephone directory, and cited by you in your letter as a regulation, applies, and such a rule, if it is reasonable, will be upheld by the courts.

In answer to your second question, I am of the opinion that paragraph (h) of Section 2, which limits a conversation, applies to local messages within exchange limits as well as to messages within the limits of the City of Chicago.

Your third question, is whether or not the citation of the rule taken from the "Regulations" as shown in the telephone directory "becomes a part of the ordinance."

It is not correct to say that such rule or regulation becomes a part of the ordinance, but more appropriate to say that it becomes a part of the subscriber's contract for service. I am of the opinion that any reasonable rule that may be adopted by the company for the good of the service becomes a part of the contract for service immediately upon such contract being entered into by a subscriber, basing my opinion on the last paragraph in Subsection (1) of Section 2 of the Telephone Ordinance of May 26, 1913, which is as follows:

“The Chicago Telephone Company shall publish in every issue of its Chicago telephone directory all rates for local exchange service and all rules and regulations affecting the subscribers, and shall embody said rates, rules and regulations in a folder to be given to any lessee or subscriber on application at the offices of the company.”

Yours very truly,

DANIEL A. ROBERTS,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Underground Water Pipes.

April 10, 1916.

HON. WILLIAM R. MOORHOUSE, Commissioner of Public Works.

Dear Sir:

Replying to your written request for an opinion as to whether it would be possible under the present laws for the South Park Commissioners to grant an ordinance to the City of Chicago for a longer period than twenty years, etc.; also what would be the position of the City of Chicago at the end of the twenty year period in regard to any water mains which might be laid under terms granted in this ordinance, we beg to state that it is our opinion that there is no limitation in the law as to the period for which an ordinance may be granted by the South Park Commissioners to the City of Chicago. That the provision in Section 4 of the ordinance referred to, which terminates the ordinance in twenty years, is probably the policy adopted by the board and not a legal question.

With reference to the position of the City of Chicago at the expiration of the ordinance in regard to water mains laid under the terms of this ordinance, it is our opinion that all

water mains laid by the City of Chicago under the provisions of this ordinance would remain permanently in the streets and boulevards unless the same constituted an obstruction to or interference with the proper maintenance, development or use of such street or boulevard; also that the City of Chicago before the expiration of this ordinance at the end of the twenty year period would be obliged to have the South Park Commissioners extend the term of this ordinance or obtain the passage of a new ordinance, otherwise the City of Chicago would be compelled to revert to the present system of obtaining a special ordinance from the South Park Commissioners whenever the city desired to lay a water main in any street or boulevard under the jurisdiction and control of the South Park Commissioners.

We return, herewith, two copies of the ordinance.

Yours very truly,

EDWARD J. SMEJKAL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Contract for Printing Opinions of Corporation Counsel.

April 12, 1916.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

We herewith return contract with Barnard & Miller for printing the opinions of the corporation counsel which was delivered to this office with a verbal request for an opinion on the right of the comptroller to pay for the work done.

It appears that the execution of said contract was authorized by the City Council by an order passed March 8, 1915, and the contract was drawn and properly executed by Barnard & Miller, but not signed by the corporation counsel who was authorized to execute the same on behalf of the City of Chicago, nor has it been approved by the mayor.

It further appears that the work was performed by the

contractor and accepted by the city. Our courts have decided that a contract may be enforced even though it may not be signed by one of the parties to it.

In the case of *Sellers v. Greer*, 172 Ill. 552, the court says:

“It will be observed that appellee did not sign the contract, and hence it is contended that the contract is not mutual. It appears, however, that the contract was delivered by Morris Sellers, appellant, to appellee, on the day it was executed, and appellee accepted the contract and agreed to its terms and conditions. The acceptance of the contract by appellee assenting to its terms, holding it and acting upon it as a valid instrument, may be regarded as equivalent to its formal execution on his part, as held by this court in *Johnson v. Dodge*, 17 Ill. 433, and *Vogel v. Pekoc*, 157 *id.* 339.”

Our conclusion is that the comptroller may lawfully pay the bill of Barnard & Miller provided an appropriation has been passed by the City Council to pay such expense.

The bill not having been paid out of the appropriation for 1915 as authorized by the order of the City Council, it is necessary that provision be made to pay the same out of appropriations subsequently passed.

Very truly yours,

EDWARD H. WRIGHT,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTTELSON,
Corporation Counsel.

Payment of Judgments.

April 17, 1916.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

Replying to your letter of the 13th instant in reference to the payment of old outstanding judgments against the corporate fund, we beg to advise you that, although in accordance with the opinion of this office under date of January 3,

1912, the attorney of record in a suit has authority to act for his client in all matters pertaining to court proceedings and satisfaction of court docket, yet as a practical matter if you deal with the attorney it is necessary for you to satisfy yourself that he is still representing the judgment creditor. Substitutions may have taken place or other matters intervened which would necessitate a search of the court records in each instance to satisfy yourself that the attorney still represented the person who has procured the judgment. We have, therefore, prepared a form of satisfaction to be signed by the judgment creditor and to which is appended an affidavit to be executed by such creditor. This form should be printed on legal cap for convenience in filing with the clerks of the various courts. We shall be glad to look over the proof before the printing is done and to advise your assistants just how this blank should be filled out in order to cover the various classes of cases.

Of course any person other than the attorney in the case holding an assignment from the judgment creditor in proper form and properly executed should be recognized if there are no prior assignments of record. On the other hand an assignment of the judgment by a client to his or her attorney would be subject to question, as the law looks with much suspicion upon property transfers from a client to his attorney. A power of attorney not embodied in an assignment should not be recognized unless you are satisfied that the person executing the same is still living.

Judgments in favor of minors should be paid only to guardians whose authority should be shown by letters of appointment from an Illinois court having probate jurisdiction filed in your office. No special order of court is necessary where the judgment is paid in full.

We shall be glad to take up other questions with you as they may occur.

Very truly yours,

GEO. E. CHIPMAN,

First Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Stopping Work on Building in Course of Construction.

April 18, 1916.

HON. CHARLES BOSTROM, Commissioner of Buildings.

Dear Sir:

Repling to your letter of the 13th instant, requesting advice as to the course you should pursue relative to stopping or allowing completion of work on a building located on Kimbark avenue near East 64th street, we beg to advise you that on December 6, 1915, the following council order was passed:

“ORDERED, That the Commissioner of Buildings and the Commissioner of Health be and they are hereby directed not to issue a permit for the construction of a building for business purposes on the east side of Kimbark avenue, between E. 63rd street and E. 64th street, until the requirement for frontage consents has been complied with.”

As we understand the matter, a permit was actually issued by your department for the erection of a building at the above-mentioned location to be used in part as a milk distributing station and in part as a retail store for milk and butter. Work was commenced under this permit but has since been stopped pending an opinion from this department as to the rights of the parties and the duty of the building department.

The ordinances relative to the subject are as follows:

Amendment to Section 712½ of The Chicago Code of 1911, passed May 18, 1914:

“Section 1. That Section 712½ of The Chicago Code of 1911 be and the same is hereby amended so as to read as follows:

“‘712½. FRONTAGE CONSENTS—BUSINESS OF SELLING MEATS, ETC.) It shall be unlawful for any person, firm or corporation to carry on the business of selling meats, poultry, fish, butter, cheese, lard, vegetables or any other provisions from any place of business located in any block in which all the *other* buildings are used exclusively for residence purposes, without first securing and filing with the *City Clerk* of the City of Chicago the written con-

sent of three-fourths of the property owners according to the frontage on both sides of the street in the block in which the building to be thus used is located, provided in determining whether all the buildings in said block are used exclusively for residence purposes, any building fronting on another street and located upon a corner shall not be considered.'

"Section 2. This ordinance shall take effect and be in force from and after its passage and due publication."

Amendments to Section 717½ of The Chicago Code of 1911 passed respectively March 24, 1913, and April 14, 1913. This section, as amended, differs only from Section 712½ in the omission of the word "other" italicized in the above Section 712½ and in the substitution of "City Collector" for "City Clerk" as above italicized.

Amendment to Article XXIV of Chapter XVI of The Chicago Code of 1911, being Section 717¾, passed June 2, 1913:

"Section 1. That Article XXIV of Chapter XVI of The Chicago Code of 1911 be and the same is hereby amended by adding thereto a section to be known as

Section 717¾ in the words and figures following:

" 'Section 717¾. No permit shall be issued for the erection or remodeling of any building in any block in which the use of buildings is restricted or regulated by ordinance if such building is designed to be used for conducting therein any business or store, without first requiring the applicant for such permit to file with the commissioner of buildings a plat showing the use to which all the property in such block is devoted.'

"Section 2. This ordinance shall be in full force and effect from and after its passage and approval."

These ordinances, by their terms, prohibit you from issuing a permit without having a plat on file showing the use to which all the property in each block is devoted, and the order of the City Council above quoted directs you not to issue a permit until the requirement of the ordinances for frontage consents has been complied with.

In view of this situation, we are of the opinion that you should revoke the permit which has already been issued.

All question of doubt as to the validity of an ordinance, where such validity has not been adjudicated by the courts, must be resolved by this department in favor of the legality and enforceability of such an ordinance.

Dicta in the case of *People v. Village of Oak Park*, 268 Ill. 256, 263, would seem to indicate that in the opinion of the Supreme Court the above quoted ordinances and the order of the City Council directing their enforcement may be considered invalid by that court if the question comes before it, but we are of the opinion that your department should not take the position of disregarding these ordinances and the order in question until adjudication of the matter has been had.

Yours very truly,

GEO. E. CHIPMAN,

First Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Validity of Vacation.

April 19, 1916.

HON. EDWARD J. GLACKIN, Secretary, Board of Local Improvements.

Dear Sir:

Replying to your communication in reference to widening East Seventy-first street, etc., and your inquiry as to the validity of the vacation instrument filed of record October 2, 1889, as Document No. 1164375, we beg to inform you that we have made an investigation with reference to the purported dedication by said plat, and whether said vacation instrument is valid would depend entirely upon the question as to whether Earl's Subdivision was a statutory dedication.

Conrad Seipp's Subdivision of the West Half (W. $\frac{1}{2}$) of the Northwest Quarter (N. W. $\frac{1}{4}$) of which Earl's Subdivision is a part, was dedicated and filed of record October 23, 1867.

On July 4, 1876, George Earl, purporting to be the owner of Lots One (1) and Four (4) (except the west two hundred ninety-seven (297) feet of Lot One (1) and the west two hundred ninety-seven (297) feet of the north sixty-six (66) feet of Lot Four (4) in Conrad Seipp's Subdivision) filed a plat of record of Earl's Subdivision, in which plat Ridgeland avenue from Seventy-first street to the center of the block, south, is shown to be thirty-seven and nine-tenths (37.9) feet wide and from the center of block south to Seventy-second street sixty-six (66) feet wide. A sixteen (16) foot alley is also shown from Seventy-first street to Seventy-second street, and a thirty-three (33) foot street from Seventy-first Street to Seventy-second street, in that portion of said Earl's Subdivision, which you stated in your letter is now claimed to be Cregier avenue.

On June 12, 1872, George W. Perry, and wife, conveyed by warranty deed to George Earl the undivided Quarter ($\frac{1}{4}$) to Sam M. Spelding the undivided Half ($\frac{1}{2}$) and to Henry F. Oliver the undivided Quarter ($\frac{1}{4}$) of Lots One (1) and Four (4) in Conrad Seipp's Subdivision, as described in the alleged Earl's Subdivision.

Earl's Subdivision was filed of record on July 14, 1876, and was acknowledged by George Earl as the owner, which acknowledgment was not in accordance with the statute in such case made and provided. Samuel M. Spelding and Henry F. Oliver did not join in said dedication instrument as owners.

On July 6, 1879, Henry F. Oliver conveyed his instrument in Lots One (1) and Four (4) in Conrad Seipp's Subdivision to G. Albert Fellows.

The records do not show that any lots have ever been sold wherein they were described as being in Earl's Subdivision, and it does not appear that the city has ever accepted any of the streets or alleys therein, even had there been a valid dedication of said subdivision.

The statute provides that the plat of a subdivision shall be acknowledged by the owner of lands in the same manner as deeds of lands are required to be acknowledged. At the time of the dedication, George Earl only owned the undivided

Quarter ($\frac{1}{4}$) of said property, and furthermore, the plat was not acknowledged as required by statute. Consequently, the subdivision was not a statutory dedication, and as Henry F. Oliver conveyed to G. Albert Fellows his undivided Quarter ($\frac{1}{4}$) of said Lots One (1) and Four (4) on July 6, 1879, three years after the filing of said plat of record, such conveyance would clearly indicate that Henry F. Oliver did not manifest any intention to set apart for public use the strip of land designated as streets and alleys in said alleged subdivision, nor were we able to find any evidence that Sam. M. Spelding, who owned the undivided Half ($\frac{1}{2}$) of Lots One (1) and Four (4), manifested any intention to set aside said streets for public purposes, nor is there any indication that the public have ever enjoyed the use of said streets in such manner and for such time as would indicate on the part of all owners that it was their intention to set apart the streets and alleys in said subdivision for the use of the public.

A primary condition of every valid dedication is that it shall be made by the owner of the fee. (*Bangam v. Mann*, 59 Ill. 492; *Smith v. Young*, 16 Ill. 169.)

We are informed that Earl's Subdivision of Lots One (1) and Four (4) in Conrad Seipp's Subdivision has been fenced in and a club house has been erected on Ridgeland avenue by the owners thereof and has so remained for the past twenty years, which, even if it could be shown that the city had an easement in said streets and alleys, it would be presumed that the city had abandoned the same. As the owners thereof have constructed lasting and valid improvements on Ridgeland avenue and the city has acquiesced therein, the city would be estopped from exercising its rights, if it had any.

Our courts have held that the owner of the fee of land, over which the public has an easement, may extinguish the easement by an open, exclusive, uninterrupted and adverse possession where such a possession is acquiesced in by the public for such a time as to raise a fair presumption of an abandonment. (56 Ill. 545; 58 Ill. 380; 159 Ill. 105; 19 Ill. 251.)

We are, therefore, of the opinion that Earl's Subdivision of Lots One (1) and Four (4) in Conrad Seipp's Subdivision,

etc., has never been legally dedicated and as there was no legal dedication the vacation instrument would have no effect other than to show the intention on behalf of George Earl as part owner of said Lots One (1) and Four (4) in Conrad Seipp's Subdivision to revoke or withdraw the dedication of Earl's Subdivision in so far as it affects his interests and that the city has no right, title or interest in said alleged streets and alleys in said Earl's Subdivision.

Following this opinion, it will be necessary for you to include in the condemnation proceedings for the widening of Seventy-first street, the north twenty-two (22) feet of Ridgeland avenue, the north twenty-two (22) feet of the sixteen (16) foot alley east of Ridgeland avenue and the north twenty-two (22) feet of what is known, or claimed, as Cregier avenue.

Yours very truly,

BENTON F. KLEEMAN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Issuance of Burial Permits for Bodies Shipped from Other Points.

April 19, 1916.

HON. JOHN DILL ROBERTSON, M. D., Commissioner of
Health.

Dear Sir:

We are in receipt of your favor of recent date enclosing two letters, one from the local registrar of the Village of Forest Park and the other from the local registrar of the Township of Proviso, Cook County, Illinois, in which communications they raise the question as to the legal right of the Department of Health of the City of Chicago to issue burial permits for the bodies of persons who have died in cities outside of the State of Illinois and that have been

shipped to Chicago for burial in cemeteries outside of the limits of the City of Chicago.

In reply, we beg to advise you that Section 5 of an act regulating the registration of births and deaths, and the issuance of burial certificates, approved June 22, 1915, in force July 1, 1915, appearing on page 661 of the Session Laws of 1915, provides as follows:

“Section 5. That the body of any person whose death has occurred in the state, or which shall have been found therein, shall not be interred or disinterred, deposited in a vault or tomb, cremated or otherwise disposed of, or removed from or into or from place to place in any registration district, nor shall it be temporarily held pending further disposition more than seventy-two hours after death, unless a permit for burial, removal or other disposition thereof shall have been properly issued by the local registrar, deputy or sub-registrar of the registration district in which the death occurred or the body was found. No burial or removal permit shall be issued by any such registrar until, whenever practicable, a complete and satisfactory certificate of death has been filed with him as hereinafter provided: *Provided*, that when a dead body is transported by common carrier into any registration district for burial therein, then the transit or removal permit issued in accordance with the law and health regulations of the place where the death occurred, shall be accepted by the local registrar of the district into which the body has been transported for burial or other disposition, as a basis upon which he may issue a local burial permit: *And, provided, further*, that where it is necessary to obtain a burial or removal permit before completion of an inquest, the coroner may make out a temporary certificate pending inquest, which certificate shall whenever practicable, give all the personal and statistical particulars required by this act and the rules of the State Board of Health. Such certificate shall be marked at the top: ‘For temporary use only,’ and shall state under the item cause of death, ‘Inquest pending.’ Such temporary certificate shall not be considered a substitute for the permanent certificate provided for in Section 8 of this act.

“No local registrar shall require from undertakers or persons acting as undertakers any fee for the issuance of burial or removal permits under this act.”

Section 3 of the same act, page 660, provides as follows:

“That for the purposes of this act the state shall be divided into vital statistics registration districts (hereinafter referred to as registration districts), as follows:

“Each city, village and incorporated town, and each township in counties under township organization (excepting that portion of the township constituting a separate registration district) and each road district in counties not under township organization (excepting that portion of the road district constituting a separate registration district) shall constitute a registration district.

“Whenever in the opinion of the State Board of Health, it is advisable to subdivide a registration district located in territory outside of cities, villages or incorporated towns of less than 100,000 population, or to combine into one district two or more registration districts located in such territory, such consolidation or subdivision may be effected by such board, and whenever two or more registration districts are consolidated or a registration district is subdivided, the said board shall appoint a local registrar for each such newly created district.”

We have carefully read your communication which has been forwarded to us, and beg to advise you that it is necessary to construe the entire act regulating the reports of births and deaths and the issuance of death certificates, approved June 22, 1915, in force July 1, 1915, for the purpose of determining what the rights of the Department of Health are in the premises.

The only question raised by the local registrars whose communications you have forwarded to us is as to the right of the Department of Health to issue burial certificates for bodies of persons who have died outside of the State of Illinois and which have been transported by a common carrier into the City of Chicago and that are to be buried in cemeteries outside of the city limits.

Section 5 of the act provides that when a dead body is transported by common carrier into any registration district for burial therein, the transit or removal permit issued in accordance with the law and health regulations of the place where the death occurred, shall be accepted by the local regis-

trar of the district into which the body has been transported for burial or other disposition as the basis upon which he may issue a local burial permit. We are unable to construe the language used in Section 5 in any other way than that it provides that the transit or removal permit must be presented to the local registrar of the district in which the body is to be buried or disposed of.

We note what you say in regard to the provisions of Section 1245 of The Chicago Code of 1911, and a careful consideration of the same compels us to advise you that there is no conflict between that section and Section 5 of the act of July 1, 1915, above referred to. Even if there were a conflict between the ordinance and the statute, it is the well-settled law of this state that where there is a conflict in the provisions of an ordinance and a statute, the provisions of the statute must prevail.

The Department of Health of the City of Chicago has a right to insist that, where bodies are transported by common carrier from cities outside of the State of Illinois to the City of Chicago to be buried in cemeteries outside of the city limits and in a different registration district than that of the City of Chicago, the undertaker secure a removal permit before the bodies are removed from the depot to another point in the city or outside of the city, and in that way the Department of Health may keep a record of all such transactions and see that the law is in no way violated.

We are, therefore, of the opinion that the objections raised by the local registrar of the Village of Forest Park, and the local registrar of the Township of Proviso are well founded, and that your department is not warranted under the law in retaining the transit permits presented by undertakers and issuing burial certificates in cases where bodies have been shipped to Chicago from cities outside the state to be buried in cemeteries outside of the city limits. You have, however, a right to insist that the transit permits be presented to you by the undertakers in order that you may issue a removal permit authorizing the undertaker to remove the body to a point in the city or to a different registration district in

cases where the body is to be buried in a cemetery outside of the city limits.

Where the death occurs in the state of Illinois a different rule applies. A burial certificate issued by the registrar of any district of the State of Illinois for the burial of the body of a person dying in the said district must be accepted by the local registrar of any district in the state, but this provision of the statute cannot be construed to apply to cases where the death has occurred outside of the limits of the state.

Yours very truly,

JAS. W. BREEN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

**Right of City to Compel South Park Commissioners to
Meet City Grade in Pavements.**

April 20, 1916.

HON. AUGUST W. MILLER, Superintendent of Streets.

Dear Sir:

We are in receipt of your letter of recent date requesting an opinion of this office as to whether or not the City of Chicago can compel the South Park Commissioners to meet the grade in pavement of the concrete alley between Kenwood and Kimbark avenues and Marquette road boulevard.

In reply to your request, we beg to advise you that under Section 1 of Chapter 105 of Hurd's Revised Statutes, 1913, approved June 16, 1871, the South Park Commissioners were created and constituted a separate and distinct municipal corporation with separate corporate powers over the park property within their jurisdiction. Under Section 49 of Chapter 105, Hurd's Revised Statutes, 1913, express power is given the Park Commissioners,

“to connect any public park, boulevard or driveway under its control with any part of any incorporated city, town or village by selecting and taking any connecting street or streets or part thereof leading to such park; * * *.”

By Section 50 of said act such Park Commissioners are authorized,

“to levy taxes or assessments for the maintenance of such parks, shall have power to improve, maintain or repair such street or streets in such manner as they may deem best; * * *.”

Our Supreme Court in the case of *Cornell v. The People*, 107 Ill. 372, and in *McCormick v. South Park Commissioners*, 150 Ill. 516, and in many cases following, have definitely decided that the Park Commissioners are a separate municipal corporation having exclusive authority within the scope of the powers set out in the statutes. Among its powers it is given the exclusive authority to lay out and improve its streets and driveways. In this respect it is acting as a separate individual corporate identity and may lay and improve its streets and driveways in such a manner as said commissioners may deem best.

We are therefore of the opinion that under the authorities and the statutes conferring the powers upon the South Park Commissioners, that the City of Chicago cannot compel them to meet the grade of its streets or alleys.

Respectfully submitted,

DAVID T. ALEXANDER,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Citizenship of Applicant for Engineer's License.

April 24, 1916.

MR. E. L. MILLER, President of the Board of Examining Engineers, Chicago, Ill.

Dear Sir:

We are in receipt of your communication of March 11,

1916, asking us for an opinion as to whether or not an applicant for an engineer's license must be a citizen of the United States.

In reply we beg to advise you that Section 2370 of The Chicago Code of 1911 provides as follows:

“An applicant for an engineer's license shall be a machinist or engineer having at least two years practice in the management, operation or construction of steam engines and boilers. An applicant for a boiler tender's license shall be a person who has a thorough knowledge of the construction, management and operation of steam boilers. Each engineer and boiler and water tender so to be licensed shall be at least twenty-one years of age, shall be of temperate habits and good character, all of which shall be vouched for in writing by at least two citizens of Chicago, or shall be verified under oath by the applicant when required by the Board of Examiners.”

The above section is the only one that refers to the qualifications of an applicant for a license, and you will observe that it is silent on the question of the citizenship of the applicant. The question of the applicant's qualification is one for the City Council to determine, and in view of the failure of the City Council to require that applicants for licenses should be citizens, we are of the opinion that it is not necessary that an applicant be a citizen in order to obtain a license.

Yours very truly,

JAMES W. BREEN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTTELSON,

Corporation Counsel.

Collection of Rebates on Special Assessments.

April 24, 1916.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

We are in receipt of your letter requesting an opinion as to whether it is legal for the City of Chicago to collect

rebates declared on special assessments which it has paid by purchase at the tax sale, as evidenced by tax certificates and tax deeds held by it. This question involves primarily the construction of Section 93 of Chapter 24, the Revised Statutes. Said section provides as follows:

“CREDITING REBATES.) If upon final settlement with the contractor for any improvement and full payment of all vouchers or bonds, issued on account of such contract, there shall be any surplus remaining in such special assessment or special tax above the payments aforesaid and above the amount necessary for the payment of interest on such vouchers or bonds, as above provided, it shall be the duty of the proper authorities of such city, incorporated town or village to at once cause a rebate to be declared upon each lot, block, tract or parcel of land assessed of its pro rata proportion of such surplus.

“The Board of Local Improvements shall cause to be kept and exhibited publicly in its office an index of all contracts upon which rebates are due and payable and upon proper proofs the same shall be repaid to the person entitled thereto.”

The question to be determined is the construction of the words “to the person entitled thereto.” In the case of *City of Chicago v. McCormick et al.*, 124 Ill. App. 639, the court in passing on a rebate, on page 640, said:

“Further, when this special assessment was levied the statute provided that ‘if too large a sum shall at any time be raised, the excess shall be refunded ratably to those who paid it.’ R. S. Hurd 1895, Section 161, Chapter 24. This section was repealed by implication by ‘An Act concerning local improvements,’ approved June 14, 1897. Section 93 of the last named act makes it the duty of the proper city authorities, when all the expenses of the improvement are paid and a surplus remains in the special assessment, ‘to at once cause a rebate to be declared upon each lot * * * assessed of its pro rata proportion of such surplus.’ * * * And ‘the same shall be repaid to the person entitled thereto.’ R. S. Hurd 1903, Sec. 599, Ch. 24.

“The pro rata proportion of the surplus in the special assessment to which the lot of appellees was entitled was thus ascertained. * * *”

In the case of *City of Chicago v. Singer*, which was an assumpsit suit brought to recover rebates due on special assessments, the court in that case treats of Section 65 of Article 9 of Part 1 of the Cities and Villages Act, reading as follows:

“If upon the payment of the money and issuance of the vouchers, as provided for in the last section hereof, there should be any surplus remaining on said special assessments over and above the payment aforesaid, it shall be the duty of the proper authorities of said city, incorporated town, or village, to at once cause the respective installment to be credited with their respective proportion of said surplus, and in case any person or persons have, before said credit has been entered, paid his assessment or any part thereof, without having received the benefit of said credit, the proper authorities shall at once cause notice of such overpayment to be sent by mail to the person by whom such overpayment was made, and upon proper proofs the same shall be repaid.”

The court also cited Section 47 of Article 9 treating of supplemental assessments and providing: “If too large a sum shall at any time be raised, the excess shall be refunded ratably to those by whom it was paid.”

The court in passing on these two sections says:

“Two cases are provided for by the section; one where the owner has not paid the special assessment levied upon his property, the other where he has. In the former, the owners are ‘to be credited with their respective proportion of said surplus;’ in the latter, ‘the proper authorities shall at once cause notice of such overpayment to be sent by mail to the person by whom such overpayment was made, and upon proper proof the same shall be repaid.’ ”

The sections cited in the *Singer* case were repealed by implication by the Local Improvement Act of 1897, and Section 93 of that act covers the subject-matter formerly embraced in Sections 47 and 65 of the former statute, hereinbefore quoted. To properly interpret Section 93 of the Local Improvement Act, it is necessary to take into account the former sections of the statutes, which it repealed, and from this it is manifest that the intention of the phrase “and upon proper proofs the same shall be repaid to the person

entitled thereto'' was to embrace the two former sections, 47 and 65. Section 65 in the Singer case was construed as having application to an owner who paid the special assessment and Section 47 applied to a party other than owner that paid the assessment. From this construction it would seem that the city having bought in at a special assessment sale, under Section 72 of the Local Improvement Act, is entitled to the rebate declared on the installments which they had paid. This would entitle the city to a proportionate amount of the rebate declared on property, according to the number of installments paid by the city.

Yours very truly,

GEO. A. CURRAN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Notice of Change of Surety.

April 25, 1916.

HON. EUGENE R. PIKE, City Comptroller, Chicago, Illinois.
Dear Sir:

In response to your letters of April 21, 1916, and April 25, 1916, concerning the re-insuring of depositary bonds signed by the Illinois Surety Company, we beg to advise you that such a course as proposed is entirely within the power of the city and is authorized under Section 37 of The Chicago Code of 1911 which makes it the duty of the comptroller to give notice upon the failure of any surety company to the principal and secure new or additional bonds.

We assume that the National Surety Company is a satisfactory company for the purpose of such re-insurance. We have, therefore, examined the guaranties for each of the bonds of city depositaries which this company has re-insured and have marked same approved as to form.

We have also drafted an ordinance for submission to the City Council accepting the guaranties and the re-insurance

agreement and approving the bonds as re-insured, so that no question can arise as to the approval of such bonds in case there should be a loss at some time in the future.

With respect to sending out notices of this change of status, we are under the impression that the wording of the bond itself precludes the possibility of any principal or surety taking advantage of this situation. Nevertheless, we deem it the better part of wisdom to send a notice in each instance to each of the other sureties on the bonds of depositaries whose status is affected by reason of this change, and also a notice to the principal in each instance to the effect that the change has been made and authorized by the City Council if the ordinance which we submit is passed by that body.

We have also prepared draft of a letter of transmission which you may adopt as a form for that purpose if you see fit. We forward herewith the ordinance and letter above referred to, a copy of the re-insurance agreement and the 15 written guaranties approved as to form.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

GEORGE E. CHIPMAN,
First Assistant Corporation Counsel.

Hospital in Close Proximity to School.

April 27, 1916.

HON. JOHN DILL ROBERTSON, M. D., Commissioner of Health.

Dear Sir:

We are in receipt of your communication of April 24th, asking us for an opinion as to the right of the Sheridan Park Hospital to remodel and enlarge the building now used by them for a hospital and advising us that since the hospital has been operating a public school has been built within four hundred feet of it, but that the remodeling of the present

building will not bring it any closer to the school than the old building was.

In reply we beg to advise you that Section 1220 of The Chicago Code of 1911, as amended, provides as follows:

“No hospital of any kind or description shall hereafter be erected or established within four hundred feet of any property used for public or parochial school purposes *or as a public playground.*”

We gather from your communication that the Sheridan Park Hospital was in existence at the present location before the adoption of the above section of the code, and that being the case we are of the opinion that it is not a violation of the above section of the code to remodel or enlarge a hospital already established and in existence. We do not think it would be possible to hold that an old and dilapidated building could be used for a hospital within four hundred feet of a public school, and that the same parties could not remodel the building and carry on the same business in a modern up-to-date fireproof building, as the Sheridan Park Hospital people desire to do in this case.

In remodeling their present building they are not seeking to establish a hospital. They already have one established at this location and as they are permitted to conduct a hospital within four hundred feet of the school in question, we think they should be permitted to have a modern up-to-date fireproof building in which to carry on their business.

Very truly yours,

JAMES W. BREEN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Hack Stands.

April 27, 1916.

TO THE HONORABLE, THE CITY COUNCIL

OF THE CITY OF CHICAGO.

Gentlemen:

In compliance with the following order passed by Your Honorable Body on April 7, 1916—

“ORDERED, That the corporation counsel render an opinion at the earliest possible date as to the right of the Hebard Omnibus Company to monopolize the State street side of the block occupied by Marshall Field and Company, to the exclusion of automobile and other traffic,”

we beg to advise you that The Chicago Code of 1911, under Section 2584, provides that the driver or person in charge or control of any vehicle licensed under the provisions of Chapter LXXIX of said code shall have the right to stand with his vehicle on any vacant place within the limits of any of the places designated in Section 2582 as public cab or hack stands, and that no preference shall be shown between different vehicles of the same class as to the choice of position within said limits, but that in the event that the driver of any omnibus or other large vehicle licensed under the provisions of Article I shall desire to locate upon any such public stand and there wait for employment, the position of any such vehicle may be designated by the Vehicle Bureau of the Department of Police.

We further advise you that Section 2582 of the said code designates twenty-five locations known as public cab or hack stands and, in addition, three other locations that may be used as stands by the owners of vehicles licensed under the provision of Chapter LXXIX aforesaid.

We have carefully examined the ordinance, and we do not find that the location described in your order as the “State street side of the block occupied by Marshall Field & Company” has been designated as one of the locations to be used as a public cab or hack stand. Consequently, the Hebard Omnibus line has no right whatever to occupy that part of State street in the vicinity of Marshall Field and Company to the exclusion of automobiles and other traffic vehicles.

Very truly yours,

JAMES W. BREEN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Discharge of Detective Sergeant After Hearing.

April 27, 1916.

HON. CHARLES C. HEALEY, General Superintendent of Police.
Dear Sir:

In reply to your inquiry concerning the discharge of John J. Kelly, Senior Detective Sergeant, who was discharged by direction of the Civil Service Commission, after a finding of guilty on certain charges heard by the Trial Board of said commission on August 27, 1915, would say that the Civil Service Commission, under date of March 30, 1916, entered the following order in its minutes:

"It appearing to the commission that it was without jurisdiction to entertain the charges of physical unfitness filed by the general superintendent of police on July 28, 1915, against John J. Kelly, senior detective sergeant, Detective Bureau, the said John J. Kelly being in the classified service as a 'holdover,' it is therefore

"Ordered that finding and decision of the commission entered on August 25, 1915, directing the discharge of the said John J. Kelly, from the Police Department, be rescinded and that the matter be referred to the general superintendent of police."

The question of jurisdiction in the matter of the removal of "holdovers" from the classified civil service being directly involved in this instance, I therefore refer to the language of our Supreme Court in the case of *People ex rel. Gersch v. City of Chicago*, 242 Ill. 561, a mandamus suit, wherein it was sought to compel the reinstatement of petitioner as a desk sergeant, on the theory that he, being a "holdover," was protected from removal from office, by virtue of the provisions of the Civil Service Act, and that his removal without a hearing on charges before the Civil Service Commission, was illegal and void. In the *Gersch* case, *supra*, the court, on page 566, said:

"The only ground upon which it is contended that the petitioner had a right to have his name restored to the pay-roll is that he came within the protection of the Civil Service Act, and he not only failed to show

this, but his petition showed that he was not within its terms. That act conferred some benefits upon members of the existing police force, and under its provisions examinations for promotion were limited to members of the next lower rank desiring to submit to an examination. (*Ptacek v. People*, 194 Ill. 125.) But there was no protection from the removal except to those who had been examined and approved by the Civil Service Commission. Section 12 of the act, as it existed at the time of petitioner's removal, prohibited the removal of an officer appointed under the rules of the Civil Service Commission except for just cause and for reasons given in writing to the commission and with an opportunity to be heard, but it did not prohibit the removal of others without written charges or a hearing. (*McNeill v. City of Chicago*, 212 Ill. 481; *Kenneally v. City of Chicago*, 220 *id.* 485.)"

In the case of *Kenneally v. City of Chicago*, 220 *id.* 485, the court, at page 501, said:

"Appellant does not allege in his petition that he was appointed as an officer in the classified civil service after his examination. Only an officer or employe in the classified civil service, who has been appointed under the rules and after examination, is entitled to invoke the provision that he cannot be removed or discharged except for cause upon written charges, and after an opportunity to be heard in his own defense. As appellant was never certified to the appointing officer of his department in accordance with Section 10 and was never appointed after his examination, he is not in a position to claim the benefit of written charges, and an opportunity to be heard under the Civil Service Act."

In the case of *McNeill v. City of Chicago*, 212 Ill. 481, the court, on page 491, said:

"By the express language of Section 12 of the act to regulate the civil service of cities, it is only applicable to those officers who 'shall have been appointed under said rules and after said examination.' By his own showing appellant had not been appointed after his examination, but appointment was refused him, and the court did not err in refusing to give the holdings asked upon the theory that appellant was protected by the Civil Service Act."

It is apparent, from the foregoing language of our Supreme Court, that it was unnecessary to present charges against Kelly for hearing by the Civil Service Commission; he being a "holdover," could have been removed at any time by the general superintendent of police, pursuant to the provisions of Chapter LVI of The Chicago Code of 1911.

The assumption of jurisdiction in this case by the Civil Service Commission cannot in any way affect the legal proposition involved, *i. e.*, that the removal of a "holdover" is a matter under the jurisdiction of the general superintendent of police, and not the Civil Service Commission.

The commission having rescinded its order of August 25, 1915, directing the discharge of Kelly, and having referred the entire matter to the general superintendent of police, the said superintendent should forthwith reinstate Kelly, unless he was removed from office by said general superintendent in accordance with the provisions of the ordinances above referred to and not as a result of the finding of the Trial Board of the Civil Service Commission and the order of said commission entered thereon.

Yours truly,

ROY S. GASKILL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

**In Re Authority of Civil Service Commission to Publish
Notice of Examination.**

April 27, 1916.

CIVIL SERVICE COMMISSION, City of Chicago.

Gentlemen:

In reply to your letter of March 10, relative to the right of the Civil Service Commission to designate the medium of publishing those matters which the provisions of the Civil Service Act direct shall be advertised, we submit that the Civil Service Commission is a branch of the city government,

its functions pertain exclusively thereto and its salaries and expenses are defrayed out of the funds of the city, in view of which we believe that where the ordinances of the city are not inconsistent with the provisions of the Civil Service Act the commission is amenable to the same.

Under the powers conferred by the Legislature the City Council undoubtedly has the power to prescribe by ordinance, in conformity with the statutes, the manner in which contracts pertaining to the printing or advertising of the city shall be made and awarded. The ordinances now in force pertaining to the matter in question, as contained in Chapter XLIX of The Chicago Code of 1911, read as follows:

“1663. ANNUAL CONTRACT FOR PUBLICATION.) The city comptroller shall annually on the first Monday of December advertise in such daily newspaper or newspapers published in the city as he may select, inviting proposals for the following contract:

“For the publication in an English newspaper, being published at least six times a week, of those matters and things required by law or any ordinance of the city to be published in a newspaper.”

“1667. CIRCULATION CONSIDERED—LIMITATION.) In determining who is the lowest reliable and responsible bidder for such contract, said board may take into consideration the circulation of the bidder's newspaper within the limits of the city; provided, however, no advertisement for any city printing whatsoever shall be given or let to any newspaper in the city which in its columns has taught, or teaches, advocates or abets any measures, or any people, who have for their object the overthrow, by force or illegal means, of the laws of the government, the state, or the city.”

“1669. OFFICIAL JOURNAL—BOND.) The newspaper to which such contract may be awarded and let shall be the official journal of the city, and shall forthwith furnish a bond with two sureties, to be approved by the comptroller, in the sum of five thousand dollars for the faithful performance of such contract.”

“1670. MATTER TO BE PRINTED—APPROVED BY COMPTROLLER—EXCEPTION—PAYMENT.) All matters to be printed in the official journal, except such as emanate from the City Council, shall first be delivered to the comptroller for his approval; and all payments for printing done by the official journal shall be made monthly.”

"1672. PRINTING OF BOARD OF LOCAL IMPROVEMENTS.) Nothing in this chapter contained shall be held to apply to any printing, notices or advertisements of the board of local improvements."

On February 7, 1916, the city executed a contract with The Chicago Evening Post Company which, among other things, contained the following agreements:

"Said City of Chicago hereby agrees that said party of the first part shall print and publish, as aforesaid, all those matters and things required by law or by ordinance of said city to be published in a newspaper, except that nothing in this contract shall be held to apply or to include the printing of any notices or advertisements of the Board of Local Improvements of the City of Chicago.

"It is further understood and agreed that the provisions of Chapter XLIX of The Chicago Code of 1911, in so far as they apply, are hereby included in and made a part of this contract."

In determining the power of the commission to act in this matter, it would seem to us that the purpose of the Civil Service Act in its entirety should be taken into consideration together with the specific provisions contained in Section 7, which reads as follows:

"Sec. 7. NOTICE OF EXAMINATIONS. Notice of the time and place and general scope of every examination shall be given by the commission by publication for two weeks preceding such examination, in a daily newspaper of general circulation published in such city, and such notice shall also be posted by said commission in a conspicuous place in their office for two weeks before such examination. Such further notice of examinations may be given as the commission shall prescribe."

Our Supreme Court has said, "The foundation principles of the act are, that appointments to municipal offices or employments must be made according to merit and fitness, to be ascertained by competitive examinations free to all," and it would be reasonable to presume that the greater the publicity given said examinations, the greater the number of persons who would make application to take the same, a result which is undoubtedly desirable and of benefit and saving to the city.

That the duty to carry out the provisions of the Civil Service Act rests solely upon the commission is beyond doubt, and that the Legislature intended to confer upon the commission the power and authority to exercise an independent discretion in matters pertaining to the enforcement of said provisions is further evidenced by the following provisions of said act:

"Sec. 18. In cities having a population of one hundred thousand inhabitants or more, * * * said commission may, in such city, also incur expenses not exceeding the amount appropriated therefor by the City Council of the city wherein said commission exists."

"Sec. 19. A sufficient sum of money shall be appropriated each year by each city which shall adopt this act to carry out the provisions of this act in such city * * *."

In view of the foregoing, it would seem to us that, in the absence of any law or ordinance which would lawfully impose some restriction or qualification upon the power of the commission and the city having made an appropriation therefor, the commission would be authorized to act in this matter as it might deem fit and proper, but, in view of the ordinances before mentioned and certain other laws and ordinances which provide for the manner in which contracts exceeding the sum of five hundred dollars shall be awarded and which also confer certain powers upon the comptroller and other city officers pertaining to the letting of city contracts, we believe that, provided the ordinances are not repugnant to the provisions and purposes of the Civil Service Act, the commission must exercise its power and authority in harmony with the city ordinances.

It does not necessarily follow because the city entered into a contract with a certain newspaper for the purpose of advertising such matters as are required to be published under the provisions of the Civil Service Act, that the city has the power to determine whether or not the medium thus employed is sufficient to meet the requirements and purposes of said act, for to hold the city has such power would deprive the commission of the right to exercise its discretion as to the proper enforcement of the provisions of said act;

in view of which we are of the opinion that if the commission is provided with sufficient funds which can be lawfully expended for the purpose of publishing such matters as are required to be published under the provisions of said act, and in the exercise of its discretion the commission is of the opinion that the medium afforded by the city for the publication of said matters is not sufficient to meet the requirements and purposes of the Civil Service Act, it would have the right, in compliance with the laws and ordinances governing the awarding of municipal contracts which are not inconsistent with the provisions and purposes of said act, to select some other and more satisfactory medium of publishing said notice of examinations.

Yours very truly,

H. C. FOSTER,

Assistant Corporation Counsel.

Approved

SAMUEL A. ETTTELSON,

Corporation Counsel.

Issuance of Permit for Driveway.

April 27, 1916.

HON. A. W. MILLER, Superintendent of Streets.

Dear Sir:

We are in receipt of your communication of April 24, 1916, requesting that we advise you as to your right to refuse to issue a permit to Joseph Flaxman to maintain a concrete driveway across the sidewalk on the east side of Normal avenue at a point about 80 feet north of 37th street, in compliance with an application filed with you by him, and stating that on the 21st of April your bureau issued to said Flaxman a permit to maintain the driveway in question across the above described premises, specifying that no change be made in the grade of the sidewalk and that curb be depressed. Your communication further states that subsequently Alderman Doyle of the 5th ward, acting on behalf

of certain residents in the vicinity noted, protested against the issuance of a permit on the ground that the locality in question is a residence neighborhood and that the said applicant, Joseph Flaxman, is maintaining therein a junk yard and has failed to procure a proper license for the conduct of such business, and that upon these representations you revoked his permit on the 22nd of April.

In reply, we beg to advise you that Section 1 of an ordinance passed July 28, 1913, appearing on page 1791 of the Journal of the Council Proceedings of said date, provides that no person, firm or corporation shall hereafter construct, build, establish or maintain driveways which depress or elevate the established grade of public sidewalks over, across or upon public sidewalks without first obtaining an order so to do from the City Council and a permit so to do as thereafter provided. Said section further provides that driveways over sidewalk space which do not elevate or depress the regular grade of sidewalks may be established, built, constructed and maintained upon permit issued by the commissioner of public works without council order, said permit to contain the provisions required by Section 4 of said ordinance, and provides further that all other provisions of the ordinance shall be fully complied with, except that the commissioner of public works may issue such permits without requiring a bond as provided for by Section 2 thereof.

From a careful examination of this entire matter, it appears to us that the applicant herein is the owner of about one-half of a square block of real estate in the vicinity of the above described location, and that there is no alley or other means of access to his land nor will there be unless a permit is given to him to establish a driveway.

The mere fact that this man may happen to be engaged in a business that requires a license, and that he has failed to obtain one, is no justification for your department to refuse to issue a permit to him to establish this driveway. If he is violating any of the ordinances of the City of Chicago by conducting a business without a license where one is required—and we do not wish to be here understood as

saying that he is—the proper course for the city to pursue would be to start a suit against him for such violation.

The ordinance of July 28, 1913, provides for the establishment and maintenance of driveways, and if the applicant in question complies with all the terms and provisions thereof your department should feel at liberty to issue the permit.

If your department is satisfied that no depression or elevation in the established grade of public sidewalks will be made by the building of this driveway, it has the power to issue the permit without an order from the City Council. On the other hand, if the grade is to be changed, you must insist that the applicant secure a council order before granting him a permit.

From all the facts we have been able to gather, we are of the opinion that—upon the representations made by the applicant herein that no change is to be made in the grade of the sidewalk by the establishment of this driveway—your department should issue a permit to establish the driveway and thereby give the applicant an opportunity to have access to his property.

Yours very truly,
JAMES W. BREEN,
Assistant Corporation Counsel.

Approved:
SAMUEL A. ETTELSON,
Corporation Counsel.

**Liquidated Damages in Contract for Building Substructure
of Pier No. 2 in District No. 1.**

April 28, 1916.

HON. E. C. SHANKLAND, Chairman, Harbor and Subway Commission.

Dear Sir:

In answer to your verbal request for an opinion as to what if any moneys due to the Great Lakes Dredge & Dock

Company under its contract with the City of Chicago for building the substructure of Pier No. 2 in Harbor District No. 1, should be withheld under the clause in said contract providing for liquidated damages of Two Hundred Dollars (\$200.00) per day for failure to complete the contract within the specified time, we submit the following:

An examination of the history of the work done under the foregoing contract as shown by the letter of the Harbor & Subway Commission dated March 27, 1916, discloses the fact that there were practically three contracts with the Great Lakes Dredge & Dock Company required to finally complete the building of the substructure and its approach but only in the first or original contract is liquidated damages provided for in the event of failure on the part of the contractor to complete his work within the time specified in the contract.

The question to be determined is whether the city may now claim liquidated damages or whether it waived such claim by changing the contract and authorizing additional work to be done thereunder.

On page 11 of the Proposal, Specifications, Contract, etc., the work to be done is set out as follows:

“Work to be done.

“The work to be done consists of furnishing all tools, plant, structures, materials, labor and facilities, including miscellaneous constructions and services, such as building and removing temporary sheds for the storage of cement, temporary offices, telephone service and all temporary bracing and protections required, and do all the necessary work to properly construct and complete the substructure for Pier No. 2, in Harbor District No. 1, in accordance with the commission's plans, and in accordance with the terms and conditions of the specifications and form of contract, hereto attached.”

The contract also includes the approach of said pier as part of said work to be done.

On October 5, 1914, the City Council provided for additional work to be done by the Great Lakes Dredge & Dock Company by the passage of the following ordinance shown at page 1431 of the Council Proceedings of said date:

“Section 1. That the Harbor and Subway Commission be and they are hereby authorized to cause the Great Lakes Dredge & Dock Company to perform work not specified in its contract with the city for constructing the sub-structure of Pier No. 2 in Harbor District No. 1, as follows:

“(1) Fill in the side portions adjoining the roadway of the pier to a point approximately two feet above the level of the roadway where it is shown on the plans, that said portion shall be depressed $4\frac{1}{2}$ feet below the level of the roadway, and that said work be paid for at the unit prices specified in the contract between the Great Lakes Dredge & Dock Company and the City of Chicago for the construction of the sub-structure of said pier.

“(2) Repair the pier given to the city by Ogden, Sheldon & Company, which pier joins a certain portion of the land recently acquired by the city from said Ogden, Sheldon & Company adjacent to Pier No. 2 in Harbor District No. 1, in a manner indicated by the plans and specifications relative thereto hereunto attached and marked Exhibits ‘A’ and ‘B’ respectively, and that the cost of repairing said dock shall be paid for at the unit prices set forth in the contract of said Great Lakes Dredge & Dock Company for the construction of the sub-structure of said pier, which in no case shall exceed the sum of \$20,000.

“(3) Fill in a strip about 1,100 feet long and 400 feet wide, lying east of the Lake Shore Drive and contiguous to and north of Grand avenue and the approach to pier No. 2 in Harbor District No. 1, and build a concrete dock resting on piles similar to the construction of the pier as shown by plans and specifications hereunto attached and marked Exhibits ‘C’ and ‘D,’ and pay therefor at the unit prices set forth in the contract between the Great Lakes Dredge & Dock Company and the City of Chicago; said work to cost approximately \$200,000.”

On December 7, 1914, the City Council again authorized additional work to be performed by the Great Lakes Dredge & Dock Company by the passage of the following ordinance shown on page 2306 of the Council Proceedings of said date:

“Section 1. That the Harbor and Subway Commission be and they are hereby authorized and directed to cause the outside of Pier No. 2 of Harbor District No.

1 in Chicago, Cook County, Illinois, to be riprapped with stone; that said work be done under the existing contract between the City of Chicago and Great Lakes Dredge & Dock Company and paid for at the unit price for stone fill fixed by the terms of said contract, and that there shall not be paid to said Great Lakes Dredge & Dock Company for said riprapping to exceed the sum of Twenty-four thousand dollars (\$24,000).''

It is stated in your letter that there was a carpenter strike from April 15, 1915, to August 16, 1915, which delayed the work to that extent, and a pile drivers' strike from July 22, 1914, to August 6, 1914, and the hydraulic fill estopped (presumably upon orders of the commission) from December 22, 1914, to March 12, 1915. The courts have decided that strikes cannot be held to be sufficient to avoid the payment of liquidated damages provided for in the contract unless a strike clause in the contract waives the damages for delay occasioned by strikes, but such strikes may be offered as the defense to a claim for damages for delay, if any, in the completion of the work subsequently authorized to be done because the additional work was not covered by a liquidated damage clause. The stoppage of the hydraulic fill from December 22, 1914, to March 12, 1915, if done upon orders from the commission, would prevent the claim of damages for that number of days providing the work under the original contract had not then been completed. However, a full consideration of all the facts convinces us that by the subsequent alteration of the character of the work and the authorization of additional work under the same contract, the city has waived its right to collect liquidated damages under the original contract.

In the case of *Bloomington Hotel Company v. Garthwait*, 227 Ill., page 613, liquidated damages were demanded from the contractor by the owner where the evidence showed that the delay was caused by changes in the original contract and additional work done by order of the owner. On page 630 of the opinion in that case the court says:

“Where the delay is caused by extra work directed by the owner and the architect, the contractor cannot be held liable therefor. Neither can he be held liable

when he is allowed to proceed with the work after the time fixed for its completion, where the owner accepts the work after it is completed and makes payment without raising any question as to the delay. Literal compliance with the provisions of a contract is not essential to a recovery. It will be sufficient if there has been an honest and faithful performance of the contract in its material and substantial parts and no willful departure from or omission of the essential points of the contract. To permit appellant to claim liquidated damages under this contract, under the circumstances shown by this record, 'would be, in our opinion, contrary to the law and abhorrent to reason and justice.' *Hartford Deposit Co. v. Calkins*, 186 Ill. 104; *Evans v. Howell*, 211 *id.* 85. See, also, *Foster v. McKeown*, 192 Ill. 339; 30 Am. & Eng. Ency. of Law (2d ed.), p. 1257."

In the case of *Palmer v. Stockwell*, 75 Mass. 238, the contractor agreed to complete the house by a certain date but after the work had begun a verbal agreement was made between the parties by which the plan of the house was altered and its size enlarged, and this change of plan produced a delay in the prosecution of the work. In passing upon the question of damages for failure of the contractor to complete the building within the specified time the court says, at page 239:

"It appears that after the written agreement was made, the plan of the house was altered and enlarged at the defendant's suggestion, so that it would take more time to build, and yet no new stipulation was made as to the time of its completion. Time thereby ceased to be of the essence of the agreement, and the defendant cannot now, in defense of an action on the agreement, avail himself of a delay in its strict performance by the plaintiff, which was caused in part by his own act."

In the case of *McGinley v. Hardy*, 18 California 115, the contractor agreed to complete a house by a certain date, but after the work was commenced and before the date specified for completion, a written endorsement was made upon the contract as follows:

"It is further agreed between the above parties that the terms of the above contract be so far changed that said building shall be thirty-nine feet front, and the

party of the first part (defendant) pay the party of the second part (plaintiff) one hundred and ten dollars extra.”

This would make the building several feet more front than per the original contract, and the owner made a claim for damages for failure of the contractor to complete the building within the specified time. The Supreme Court in deciding the case sustained the finding of the lower court which rendered judgment in favor of the contractor in the following language:

“We have examined the record in this case, and find no error for which the judgment should be reversed. The alterations in the plan of the building constitute a sufficient answer to any claim on the part of the defendant growing out of failure to complete the contract within the time specified. The circumstances show very clearly a modification of the contract in this respect.”

In *Close et al. v. Clark et al.*, 9 N. Y. Supp. 538, the contract required the competition of the work by a certain date, but changes were subsequently made in the plan. In passing upon the claim of the owner for damages for failure of the contractor to complete the work within the time specified in the contract, the court says:

“It appears that there were departures by mutual consent from the original plan and, furthermore, that after the time prescribed by the contract had expired the defendant Clark notified plaintiffs to go on and complete. Under competent authorities either of these circumstances would operate as a waiver of the time condition in the contract.”

In the case of *Dodd v. Churton*, 66 Law Journal Reports 477, the English Court of Appeal announced the following to be the law:

“Where, under a building contract, the builder agrees to complete certain specified works by a specified date under a penalty for delay, and also undertakes to execute any additional works that may be ordered, if the building owner orders additional works which necessarily delay the completion of the works, he cannot recover penalties for delay, unless the builder has agreed

to complete both the specified and the additional works by the specified date."

In the last foregoing case the word "penalties" is used interchangeably with the words "liquidated damages" as used in the contract under consideration.

Our conclusion, therefore, is that the city cannot legally collect liquidated damages from the Great Lakes Dredge & Dock Company under the facts submitted by the Harbor and Subway Commission as applied to its contract of December 18, 1913.

Very truly yours,
EDWARD H. WRIGHT,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Frontage Consents for Garage.

May 2, 1916.

HON. CHAS. BOSTROM, Commissioner of Buildings.

Dear Sir:

We are in receipt of your favor of April 13th, asking us for an opinion as to whether or not you should accept the frontage consent of a majority of the property owners on the east side of Lake Park avenue between 51st street and the south side of 49th street produced and on the west side of Lake Park avenue between 51st street and 49th street, in order to issue a permit for the erection of a building to be used as a garage on Lake Park avenue, immediately north of 51st street or Hyde Park boulevard.

In reply we beg to advise you that we have carefully noted the contents of your communication, and have caused the City Map Department to prepare a plat of the territory in the vicinity of the location of the proposed garage, and from an examination of said plat, we find that the proposed garage will front on Lake Park avenue, and that the intersecting street south of the proposed location is known

as Hyde Park boulevard or 51st street. On the side of the street opposite to where the proposed garage is to be located for a distance of several hundred feet, there is a row of buildings extending to a point where Lake Park avenue merges with Harper avenue and results in the forming of a triangular corner, where the above streets meet, and we are of the opinion that so far as securing signatures on the west side of Lake Park avenue is required, it will be sufficient to secure the frontage consents of the people residing in the territory bounded on the south by Hyde Park boulevard or 51st street, and on the north, where Lake Park avenue and Harper avenue merge and meet, that area constituting a full and complete block within the meaning of the ordinance. As to the matter of securing the frontage consent on the east side of Lake Park avenue, we beg to advise you that the plat before us shows a strip of land located several feet north of the point where Lake Park avenue merges with Harper avenue, constituting the block on the west side of the street, that has been used as a passageway for the public to walk over to get access to the Illinois Central depot.

This passageway is over 11 feet wide and has been used by the public for over 20 years, and buildings have been erected facing the passageway in question, giving it every appearance of a highway for the exclusive use of the public. The area extending from Hyde Park boulevard or 51st street to the point in Lake Park avenue where this passageway is located is considerably greater than the area extending on the west side of Lake Park avenue from Hyde Park boulevard or 51st street, to where Harper avenue and Lake Park avenue merge, and it is our opinion that it is our duty to hold that the area on the east side of Lake Park avenue extending from Hyde Park boulevard or 51st street to this passageway, should be held to constitute a block within the meaning of the ordinance requiring frontage consents in order to erect buildings to be used as garages.

There is no other intersecting point between Hyde Park boulevard or 51st street and 47th street within the territory bounded on the west by Lake Park avenue and on the east by the Illinois Central Railroad tracks and we consider it

unfair and unreasonable to hold that a strip of land nearly $\frac{1}{2}$ mile in length should be held to constitute a block and require a person who desires, as in the case before us, to operate a garage at the extreme south end of this area to secure the frontage consent of a majority of the people residing within the entire area. In the case of *Harrison v. the People*, 191 Ill. 257, the court said that in construing ordinances, no less than statutes, all general provisions, terms, phrases and expressions should be liberally construed, in order that their true intent and meaning may be fully carried out; and where great inconvenience or absurd consequences would result from a particular construction, that construction should be avoided if possible.

We therefore beg to advise you that you are justified in issuing a permit for the erection of the proposed garage without requiring any frontage consents whatsoever unless two-thirds of the buildings located on the east side of Lake Park avenue between where Lake Park avenue is intersected on the south by Hyde Park boulevard or 51st street, and on the north by the passage way to the Illinois Central depot, and on the west side of the street between the points where Lake Park avenue is intersected on the south by Hyde Park boulevard or 51st street and on the north where Lake Park avenue merges with Harper avenue and causes a triangular corner, are used exclusively for residence purposes.

Unless two-thirds of the buildings within the above described premises are used exclusively for residence purposes, no frontage consents for the erection of a garage are necessary.

In conclusion, we beg to advise you that if more than two-thirds of the buildings facing Lake Park avenue within the limits of the territory that we have defined are used exclusively for residence purposes, it is necessary for the applicant who desires a permit to erect a garage, to secure the written consent of a majority of the property owners within the territory that we have defined, and upon the presentation to you of a petition signed by a majority of the property owners, according to frontage on both sides of Lake

Park avenue within the boundaries that we have defined in this communication, it is our opinion that it is your duty to issue the necessary permit, authorizing the construction of a building to be used as a garage at the location in question.

Yours very truly,

JAMES W. BREEN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTIELSON,

Corporation Counsel.

Proposed Ordinance Requiring Certain Motor Vehicles to Be Equipped with Fenders.

May 2, 1916.

HON. OTTO KERNER, Chairman, Judiciary Committee, City Hall, Chicago.

Dear Alderman:

We return you herewith the proposed ordinance which you submitted to us some time ago for our opinion as to its validity; and in regard thereto we beg to say:

Our observations hereinafter made regarding fenders must be understood as being made solely with respect to the question of the legality of the proposed ordinance above mentioned. What, if any, motor vehicles should be equipped with fenders and the kind of fenders with which they should be equipped are, as we fully appreciate, questions for the City Council as to which we are not expected to express any opinion. So, as above stated, we limit ourselves to the question of the legality of the proposed ordinance.

The legislation on this subject is in an experimental stage. There are no direct authorities on which we can rely. Hence our views must be, to a considerable extent, speculative. As a practical proposition, the Council will have to adopt an ordinance as free as possible from apparent defects and objections and abide the decisions of the courts as to its validity.

As we will probably be called upon to defend such ordinance in the courts, it seems to be clearly advisable for us not to express an opinion as to the validity of the ordinance as a whole, but to limit ourselves to making some suggestions as to how in our view, the ordinance may be improved and strengthened with respect to its validity.

The difficulty in drawing an ordinance of this kind is enhanced by the very sharp difference in views as to what elements should be required in fenders. On the one hand is the view that the ordinance should be in very general terms, requiring the vehicles to be equipped with fenders reasonably fit and suitable to prevent accidents, but leaving to the owner of the motor vehicle a very large discretion as to the kind of fender to be used; and, on the other hand, is the view that the ordinance should prescribe, in minute detail, all the elements, parts and requirements of the fenders. To an ordinance in general terms the objection is made that such an ordinance has in other cities proved to be and in Chicago will prove to be practically ineffective; as thereunder, the various owners would formally comply with the ordinance by equipping their vehicles with all sorts of fenders, some perhaps good but mostly bad and practically useless to accomplish the end desired. To an ordinance prescribing minutely the details required in fenders the objection is apt to be made that it is unreasonable in that the vehicle owner is unduly deprived of the right to exercise a reasonable discretion as to the kind of a fender he will use. There is force in the claim that the vehicle owner should be at liberty to select such fender as he prefers provided it is actually sufficient to accomplish the end desired. Thus, for illustration, ordinances may prescribe general rules with regard to buildings; but an ordinance prescribing the detailed plans and specifications for buildings would be regarded as unreasonable as encroaching upon the liberty of the owner. This analogy may not be very close; but it seems to illustrate the point we are making. Probably, as it seems to us, it will be necessary to devise an ordinance midway between these extremes, that is to say, an ordinance containing enough detail to insure that the fenders will be practically efficient;

but not containing so much detail as to make the ordinance legally objectionable. The more the subject is studied the more will it be realized that to devise such an ordinance is a very difficult task, although not an impossible one.

Taking up the ordinance submitted, in the light of the foregoing suggestions, we submit the following:

1. This ordinance seems to be open to substantially all the objections on account of which Judge Walker held the former ordinance to be invalid except that by this ordinance the ultimate decision as to whether or not a given type of fenders is efficient and sufficient, under the ordinance, rests with the Clerical, Mechanical and Inspection Bureau of the Department of Police, whereas by the former ordinance such decision rested with the superintendent of police. There is a fair question whether this change overcomes the objections on which Judge Walker declared the former ordinance to be invalid.

2. This ordinance sets forth a great many minute details which must be complied with in making the test. To each of these details equal importance is apparently attached. The question then arises whether it is the intention that a failure to observe any single one of these particulars will invalidate the test, and there is a broader question, viz.: Whether the city has the power to require vehicle owners to use, exclusively, such fenders as have passed the test prescribed by this proposed ordinance? Is it within the power of the City Council to require a vehicle owner to use a type of fender which has passed the prescribed test, although it may appear that such owner has his vehicle equipped with a fender actually better and more efficient than those which have passed the test?

3. This proposed ordinance apparently defines a "motor truck" as a "motor vehicle designed and used for the purpose of conveying loads of bundles, parcels, crates, boxes, baggage, wares, merchandise, machinery, materials or substance of any kind." What is meant by "loads"? Are partial "loads" contemplated? And what is included in "bundles, parcels, crates, boxes, baggage, wares, merchandise, machinery, materials or substances"? Specifically is it intended to

include taxicabs, hearses, and undertaker wagons, and the machines in which the newspapers deliver their papers to the dealers? And will the ordinance apply only to vehicles used exclusively or commercially for the purposes named or will it apply to ordinary passenger automobiles when used to convey the things specified?

Furthermore, this ordinance includes, among other things, "loads of * * * materials or *substance* of any kind."

The contention must be anticipated that the word "substance" was used to mean something different from "materials," otherwise both words would not have been used; and one definition of substance is (6 Cent. Dict., p. 6031): "Any particular kind of corporeal matter," in illustration of which definition is given the following quotation from Shakespeare:

"Sir, there she stands,
If aught within that little seeming *substance*
* * * may fitly like your grace,
She's there, and she is yours."

So it may be urged that this ordinance is uncertain and indefinite in not sufficiently indicating what motor vehicles are intended to be included within its terms; and, of course, the city will, in all probability, be confronted by the claim that the classification of vehicles into those which must be and those which need not be equipped with fenders is not a fair and reasonable classification or such a one as the city has the right to make.

4. Again this proposed ordinance prescribes that "no type of fender shall be approved by the general superintendent of police *unless it has been subjected* to the tests herein prescribed under the direction of the Clerical, Mechanical, and Inspection Bureau of the Department of Police and has developed the standard of efficiency required by the ordinance, or unless it shall be hereafter subjected to such tests and shall develop the required efficiency. It may be argued that the provision is *ex post facto* in that it relates back so as to include fenders which have passed a test prior to the adoption of the ordinance; and that this ordinance is designed to require vehicle owners to equip their vehicles with fenders of a certain particular manufacture.

5. Furthermore, the proposed ordinance requires "motor trucks" to be equipped with the specified fenders regardless of the capacity of such trucks. But the reports now on file of the Clerical, Mechanical and Inspection Bureau of the Department of Police show that such fenders can be practically used only on trucks of approximately two tons or more capacity; and that they cannot be so used on motor trucks of less than that capacity. Hence it may be urged that the proposed ordinance requires many motor trucks to be equipped with fenders with which they cannot be operated. Hence it may be advisable that some basis of classification be devised which will appropriately recognize and provide for this difference between large trucks and small trucks.

We have endeavored to point out what appears to us to be at least some of the imperfections of this proposed ordinance. If we can be of further assistance to you in this matter, please command us.

Yours very truly,

CHESTER E. CLEVELAND,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Inspection of Steam Boilers in Rooming Houses.

May 4, 1916.

GEORGE E. NYE, Esq., Chief Inspector, Department for the Inspection of Steam Boilers.

Dear Sir:

Replying to your letter of the 17 ult., in which you ask for a construction of Section 2393 of The Chicago Code of 1911, in reference to rooming-houses, we beg to advise you that this section, so far as applicable to the present case, reads as follows:

"The provisions of this article relating to the inspec-

tion of steam boilers, generators or other apparatus carrying other than city pressure shall be held to apply to any such steam boiler, generator or apparatus in use or installed in any steam roller, steam derrick, steam pile driver, automobile or other movable structure or contrivance of any kind whatsoever used within the city; provided, however, that this article shall not apply to elevator tanks, except as hereinafter provided, and to boilers, generators or other apparatus used in private residences for generating steam solely for heating purposes; and for the purpose of this article flat buildings or apartment buildings with more than three apartments shall not be classed as private residences, and any steam boiler, generator or other apparatus used for generating steam in flat buildings or apartment buildings having more than three flats or apartments shall be subject to inspection as hereinbefore provided."

It will be noted that the exemption from inspection applies to private residences which by the ordinance are made to include flat buildings or apartment buildings not having more than three flats or apartments. A private dwelling or residence has been defined as one in which a person or family lives in an individual or private state.

(*Barnett v. Vaughn Inst.*, 134 N. Y. App. Div. 921.)

The word "private" has been held to exclude buildings for residential purposes of public character, such as hotels or general public boarding or community houses.

(*Skillman v. Smatheurst*, 57 N. J. Eq. 1; *Gaunett v. Albree*, 103 Mass. 372.)

From these authorities, as well as the well recognized meaning of the word "private," we are of the opinion that rooming-houses do not come within the exception contained in Section 2393 of The Chicago Code of 1911 and that this is irrespective of the number of rooms contained in such rooming-houses.

Yours very truly,

GEO. E. CHIPMAN,
Acting Corporation Counsel.

Status of Employees Laid Off on Account of Lack of Funds.

May 5, 1916.

TO THE BOARD OF TRUSTEES OF THE MUNICIPAL PENSION FUND
OF THE CITY OF CHICAGO.

Gentlemen:

We are in receipt of your communication of recent date, asking for an opinion covering the status of employees who were formerly employed in the boiler inspector's office as boiler inspector's helpers and who were laid off in July, 1915, on account of lack of funds, and for whom no appropriation has so far been provided in the 1916 budget.

In reply, we beg to advise you that we have not been able to find where the position of boiler inspector's helper was ever created by a city ordinance. The annual budget for several years appropriated money to pay boiler inspector's helpers and that practice continued up to the present year.

Where positions have not been created by a city ordinance, and where a specific position is not mentioned in the annual budget, we are of the opinion that the failure of the Council to appropriate for a position not created by ordinance amounts to an abolishment of the position in question. The City Council, however, under the present law, has the power to amend the budget at any time prior to July 1, and we do not feel warranted in saying that the failure of the Council to provide an appropriation for these men up to the present time constitutes an abolishment of the positions held by them in the boiler inspector's office. The mere fact that these men who formerly held the position of boiler inspector's helpers may be eligible to take an examination for boiler inspector has no bearing upon the case. They are now separated from the service of the City of Chicago through no fault of their own.

We are, therefore, of the opinion that if the Council permits July 1 to pass by without amending the budget so as to include an appropriation for the payment of boiler

inspector's helpers, their failure so to do must be construed as an abolishment of the positions of boiler inspector's helpers, and when that time arrives the applicants in question will be entitled to a refund of the moneys contributed by them to the Municipal Pension Fund of the City of Chicago.

Yours very truly,

JAMES W. BREEN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Legality of Bid for Constructing West Approaches to Lake Street Bridge.

May 5, 1916.

HON. WILLIAM R. MOORHOUSE, Commissioner of Public Works.

Dear Sir:

We have your letter of the 3rd inst. asking for an opinion as to whether or not the bid of W. A. Kenefick for constructing the west approaches to the Lake street bridge should be rejected because of failure of the bidder to fix a price for one of the units comprising the work consisting of the item marked "O."

We have examined the advertisement and specifications relating to the work and original proposal submitted by W. A. Kenefick and find that the bid submitted does not cover the whole work comprised in the specifications. The first paragraph of the typewritten specifications is as follows:

"Quantities to be paid for.

All quantities given or assumed are approximate only, and are given for the purpose of canvassing bids. The actual quantities, as determined by measurements, will be paid for at the prices stated in bid."

In the proposal of W. A. Kenefick item "O" reads as follows:

“O. For furnishing and placing new manholes complete with cast-iron cover, including all necessary excavation and backfilling, as specified the sum of _____ Dollars (\$_____)

Number of new manholes assumed: 2.”

In the absence of the paragraph of the specifications hereinabove mentioned, it might properly be assumed that the bidder, while omitting to put a price upon the furnishing and placing of new manholes, had nevertheless bound himself to furnish and place two new manholes according to the specifications. But in the light of the specifications as a whole no such claim can be successfully maintained.

If the city could require the bidder to furnish two new manholes under his present proposal it could require him to furnish a hundred new manholes without compensation under the paragraph cited in the specifications.

In the matter of the *Petition of Ralph Marsh*, 83 N. Y. 431, it was attempted to have an assessment for a local improvement vacated. The commissioner of public works in publishing the notice required that bidders should state in their proposals the price per cubic yard for rock excavations, and one-fourth the price bid would be allowed as the price for earth excavations; the notice contained the estimated quantities of work to be done. One bidder (Bannon) bid for earth excavation less than one-fourth price bid for rock excavation and another bidder (Farley) bid for earth excavation more than one-fourth of the price bid for rock excavation but nevertheless Farley's bid was lower on the whole estimated work than Bannon's bid and upon the awarding of the contract to Bannon, Farley secured an order of the General Term of the Supreme Court vacating the assessment for paying for the work done under the contract. On appeal this order was reversed by the Court of Appeals, and the court makes use of this language at page 435:

“The contract was not let to the lowest bidder as Farley's bid was a little lower in the gross amount than Bannon's. But Farley did not conform to the specifications as interpreted by the commissioner and hence his bid was thrown out as informal. The price he bid on earth excavation was three-eighths of a cent per yard

more than one-fourth of the sum he bid for rock excavation. This, it is true, was a trifling difference. But, if the commissioner had the right to insert the specification, as we hold he did have, then he had the right to require literal and exact compliance therewith, and to decline all bids as informal which did not comply therewith. The commissioner interpreted the specification to require the bids for earth excavation per yard to be not more than one-quarter the sum bid for rock excavation, thus allowing the bid for earth excavation to be less than the one-quarter. If this be the correct interpretation as it has been assumed to be by both parties to this proceeding, then Bannon was the lowest bidder who complied with the specification."

It appears that the bid of W. A. Kenefick is approximately \$1,500 less than the next lowest bidder and that Kenefick, by letter written subsequently to the opening of the bids, declares his willingness to enter into a contract for the whole work including two new manholes without additional cost for the manholes, but his original bid cannot be amended to include matter not contained therein at the time of the opening of the bids.

We are of the opinion that the bid submitted by W. A. Kenefick must be rejected as not complying with the specifications.

Yours very truly,

EDWARD H. WRIGHT,
Assistant Corporation Counsel.

Approved:

GEO. E. CHIPMAN,
Acting Corporation Counsel.

Time of Taking Effect of Penal Ordinance.

May 6, 1916.

HON. CHARLES C. HEALEY, General Superintendent of Police.

Dear Sir:

Your communication No. 20666 relative to an ordinance passed by the City Council on the 7th day of April, A.D

1916, and found on page 4330 of the Journal of the Proceedings of the City Council asking for an opinion relative to same, has been referred to me.

In reply thereto, beg to state in answer to your first question that the said ordinance will be in full force and effect from and after its passage and due publication as is provided for in the 64th Section of Chapter 24, of Hurd's Revised Statutes 1911, which requires all ordinances imposing fine, penalty, imprisonment or forfeiture, etc., to be published within one month from the passage thereof and to take effect *ten days after* such publication.

In answer to your second question, I beg to state that the usual rule of construction in the computation of time is that the first day shall be excluded and the last day included, unless the last day is Sunday and then it also shall be excluded.

Chapter 131, Section 11 of Hurd's Revised Statutes of 1911.

For all general purposes the law regards a day, which is a continuous period of twenty-four hours commencing at midnight, as the unit of measure and takes no note of fractions.

Cummins v. Holmes, 11 Ill. App. 158.

Section 64 of Chapter 24 of Hurd's Revised Statutes above referred to states that "no such ordinance shall take effect until ten days after it is so published." To properly answer your question, it is necessary to construe this clause.

Your communication recites that the ordinance referred to was published in the noon edition of The Chicago Evening Post of April 29, 1916. Under the rule of construction above stated in the computation of time, it would be necessary to exclude this date and commence the computation from the first minute of April 30, 1916. This rule is supported by numerous decisions, for instance, *In re Bigelow v. Willson*, 18 Mass. 485, in which it was held that where a period of time is to be computed "after" a certain date it is meant that such date should be excluded in the computation.

In Statute of Limitations providing that suits must be brought within six years "after" the cause of action accrues, "after" will be construed as excluding the date on which the cause accrued.

Brisben v. Wilson, 60 Pa. 452.

Duffy v. Osborn, 64 Pa. 240.

The words "until 10 days" should be construed to mean ten full days and such ten full days should be exclusive of the date of publication and the date upon which the ordinance actually becomes operative.

In the case of *Ewing v. Bailey*, 5 Ill. 420, in which case Ewing entered an appeal before a justice of the peace on the 5th of May, 1842, and filed a bond in said case, the court in construing the statute which requires persons taking appeals to enter into a bond before a justice of the peace and to file the bond and other papers in the office of the clerk of the Circuit Court *within twenty days* after the approval of the bond said that:

"The proper mode of computing time, where an act is to be performed within a particular period from or after a specified day, is to exclude the day named, and include the day on which the act is to be done. * * * By this rule, the day on which the appeal bond was executed was to be excluded in the computation of the twenty days, and the justice had *the whole* of the 25th of May in which to file the papers. * * *"

This case is followed by our Supreme Court in the matter of computation of time.

In the case of *City of Chicago v. Henry Miller*, 146 Ill. App. 530, Judge Adams, construing an ordinance of the City of Chicago, said in reference to the time at which said ordinance became operative that the ordinance referred to "was passed October 22, 1906, and was published October 24, 1906. Ten days after such publication expired November 3, 1906," thereby including ten full days from the date of publication to the date of expiration of said publication.

The ordinance referred to in my opinion becomes operative at the expiration of ten full days "after" the date of

publication, which would be at 12:01 A. M. Wednesday, May 10, 1916.

Yours very truly,

DANIEL A. ROBERTS,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTIELSON,
Corporation Counsel.

Refund of Pension Payments to Municipal Employee.

May 6, 1916.

TO THE BOARD OF TRUSTEES OF THE MUNICIPAL PENSION FUND
OF THE CITY OF CHICAGO.

Gentlemen:

We are in receipt of your communication asking us for an opinion as to the power of the Board of Trustees of the Municipal Pension Fund to grant a refund to an employe of the City of Chicago who has resigned his position for the purpose of taking another position with the city in a different department.

In reply we beg to advise you that the Board of Trustees of the Municipal Pension Fund has the power to grant a refund equal to one-half the amount contributed by a participant to the Municipal Pension Fund when the participant becomes separated from the service of the city by resignation.

An examination of the entire section of the statute referring to refunds leaves no doubt in our minds that it was the intention of the General Assembly to permit participants in the pension fund to receive a refund only when they had ceased to be employes of the city and unable to longer participate in the pension fund.

There are numerous departments in the city government, and the employes of all departments in the classified service are participants in the Municipal Pension Fund, and we cannot hold that the changing of an employe from one department to another by resignation amounts to a separation from

the service of the city within the meaning of the statute empowering the Municipal Pension Fund Board to grant refunds.

We, therefore, recommend that your board decline to entertain such application for refund.

Yours very truly,

JAMES W. BREEN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Law Governing Picketing.

May 6, 1916.

HON. THOMAS J. LYNCH, Chairman, Committee on Schools,
Fire, Police and Civil Service.

Dear Sir:

We are in receipt of a letter from Hon. John Siman, city clerk, dated April 18, 1916, with enclosure of a communication from Mr. Dudley Taylor in reference to the law on the subject of picketing, in which he states that your committee desires to have an opinion as to whether Mr. Taylor's communication contains a correct statement of the law.

Since this department, in an opinion dated February 22, 1916, advised your committee at some length as to the law in reference to the subject of picketing, we assume that your committee does not now desire any extended comment on this subject, but rather wishes a brief statement as to whether or not Mr. Taylor has, in our opinion, correctly stated the law.

We beg to say that Mr. Taylor's understanding of the law upon this subject appears to be substantially similar to our own. As he stated, the case of *Barnes v. Chicago Typographical Union*, 232 Ill. 424, contains the last expression of the Supreme Court of Illinois upon the law in reference to picketing, and it is there held that:

“any picket line must result in annoyance both to the employer and the workmen, no matter what is said or done”

and that:

“to picket the complainants’ premises was in itself an act of intimidation and an unwarrantable interference with their rights”;

that the

“pickets were, in fact, guilty of actual intimidation and threats, but if they had not been, the complainants were entitled to be protected from the annoyance.”

The court has thus aligned itself with those courts which hold that the mere presence of pickets is calculated to result in intimidation and coercion and is, therefore, unlawful.

We agree with Mr. Taylor that the law, as therein established, was not changed by the Supreme Court in the case of *Kemp v. Division No. 241*, 255 Ill. 213. This view was sustained by Judge Jesse A. Baldwin in the case of *Knab v. Waitresses’ Union*, in an opinion delivered November 5, 1914, and by the Appellate Court in a decision handed down on April 12, 1916, in the suit arising out of the picketing of Henrici’s Restaurant by the Waitresses’ Union in 1914. In the latter case the court modified the injunctive decree entered by the lower court so that it read as follows:

“That the defendants to the original bill, and each of them, and their attorneys, solicitors, agents, servants and associates and each and every of them be enjoined and restrained from unlawfully hindering, obstructing or interfering with the business of the complainant, Philip Henrici Company or its employes by any act of violence or intimidation or by picketing or patrolling the street in front of, or in the alley in the rear, of complainant’s place of business at 67 to 71 West Randolph street in the City of Chicago, Cook County, Illinois.”

Mr. Taylor has correctly stated that picketing having an unlawful purpose is itself unlawful. If, for example, picketing is maintained for the purpose of coercing, intimidating or annoying employes so that they will refuse to work for their employer, an injunction may be obtained to enjoin

it. This is the law in all jurisdictions. The point of conflict between the courts of different states is merely on the question whether picketing in itself necessarily results in unlawful intimidation, coercion and annoyance. Picketing is likewise unlawful if it is maintained for the purpose of injuring a proprietor by means of a boycott. Mr. Taylor discusses in his communication different unlawful purposes which he asserts are achieved through the medium of picketing. While we are not informed and do not wish to be understood as expressing any opinion as to the correctness of his statement in regard to the prevalence of the methods which he ascribes to union workers in labor controversies, we acquiesce in his statement of the rule that picketing, which is maintained for unlawful purposes, is in itself unlawful.

The decision rendered by Justice Francis Baker in the case of *Iron Molders' Union v. Allis-Chalmers Company*, 166 Fed. 45, which is referred to by Mr. Taylor, is generally relied upon by those who seek to show that peaceable picketing is lawful. The rule is there stated that picketing may be enjoined only if proof is made of the fact that it results in intimidation or coercion or achieves some other unlawful purpose, and it is also asserted that it is not unlawful for pickets to use peaceable persuasion to induce employes to leave their employment. It is impossible to harmonize this decision with the opinion of the Supreme Court of Illinois in *Barnes v. Typographical Union, supra*, where it is held, as previously shown, that picketing necessarily results in annoyance and intimidation and is, therefore, in itself, unlawful.

We return herewith Mr. Taylor's communication and printed opinion by Judge Baldwin.

Yours very truly,

RALPH G. CRANDALL,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Regulation of Second-Hand Dealers.

May 8, 1916.

HON. JOHN TOMAN, Chairman of Committee on License.

Dear Sir :

The request of your committee for an opinion upon the legality of an ordinance for the regulation of second-hand and junk dealers was referred to this department by the Honorable John Siman, city clerk, under date of March 9, 1916. In reply thereto we beg to submit the following :

Under date of February 3, 1916, the Finance Committee sent a request to the Law Department for the draft of an ordinance providing for the licensing and regulation of wholesale and junk dealers. This matter was referred to James G. Skinner, then Assistant Corporation Counsel, and the draft of ordinance referred to you was the result of a great deal of work on the part of Mr. Skinner, who was in frequent consultation with First Assistant Corporation Counsel Chipman.

The Supreme Court of the State, in the case of *Chicago v. Lowenthal*, 242 Ill. 404, decided December 22, 1909, held as follows :

“We think, within the meaning of this ordinance, a ‘junk shop’ is a room or building where junk is dealt with in small quantities.”

In that case the defendant Lowenthal, who was held to be engaged in the wholesale junk business, succeeded in maintaining the position that the city code or ordinance, as it then existed, either did not apply to wholesale junk dealers or that its provisions were not a reasonable regulation of the junk business when conducted as a wholesale business. The opinion of the Supreme Court, however, in that case is clearly confined and restricted to the ordinance as it then stood, which was the ordinance contained in The Municipal Code of 1905. Several provisions of The Code of 1911 remain unchanged. The Supreme Court, however, did not say that the City Council has not power to regulate the wholesale junk business.

Paragraph 95 of Section 1 of Article 5 of the Cities and Villages Act confers upon the City Council powers as follows:

“To tax, license and regulate second-hand and junk stores and yards, and to forbid their purchasing or receiving from minors without the written consent of their parents or guardians, any article whatsoever, and to direct the location thereof.”

From this grant of legislative power it is clearly seen that there is no distinction between retail and wholesale junk business. Accordingly, then, the problem before the draftsmen is to so shape the provisions of the ordinance so that the sections that apply to the wholesale business will come within the scope of the legislative grant and at the same time will not violate the principles of judicial construction as laid down in the Lowenthal case. This is what has been sought in the draft of ordinance now before your committee and we feel that this result has been accomplished.

As above set forth it appears that the term “junk shop” was used in the ordinance of 1905, which was the one passed upon in the Lowenthal case and not the term “junk store,” which is a larger and broader term and which is the one used in the grant of legislative power, also above set forth. Chapter 64, which is the chapter of the code which treats of second-hand dealers and keepers of junk shops, is divided into three parts or articles: the first relates to second-hand dealers, the second to keepers of junk shops and the third contains general provisions applying to both second-hand dealers and junk shops. It will thus be seen that many of the sections of Article 3 of the chapter affect both second-hand dealers and keepers of junk shops. In order to obviate the objection of the Lowenthal case it, therefore, became necessary to change all of the sections that referred to junk shops and many of these sections likewise referred to second-hand dealers, thus making it necessary to revise from beginning to end the entire chapter. This, after conferring with administrative officers and reading many authorities, has been carefully gone over and put into the draft. The term “junk shop” in every instance has been changed to the

larger and more inclusive term of "junk store" with junk yard added in order to make the present draft inclusive of wholesale as well as retail junk businesses. Certain provisions which are applicable only to the retail business, as pointed out in the Lowenthal case, have been retained in the present draft and made applicable only to that class of business, while certain other provisions which are intended to give a proper and reasonable regulation of the wholesale business have been put into the present draft, at the same time eliminating the objectionable features as applied to the wholesale business and as pointed out in the Lowenthal case.

After further consideration in consultation with both Mr. Chipman and Mr. Skinner we have come to the conclusion that the first paragraph of Section 2252 of the draft, which embodies the definition of the term "junk" should be eliminated, the remaining seven paragraphs of said section, however, to be retained. The reason for omitting the first paragraph, which purports to define the term "junk," is that we deem it more safe from the point of legal construction to omit this definition from the ordinance and leave the matter of definition to the courts which will construe the ordinance. The definition was originally included because of the fact that it is much easier for city officials to administer the ordinance with it than without it.

We are accordingly of the opinion that the draft with the changes indicated is in proper legal form and is within the legislative grant of power contained in Paragraph 95 of Section 1 of Article 5 of the Cities and Villages Act.

Respectfully submitted,

H. L. BRIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Transfer and Cancellation of Fidelity Bonds.

May 9, 1916.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

We are in receipt of your communication of May 3rd asking for an opinion as to the transfer and cancellation of fidelity bonds of city officials, after the expiration of one year's service, appointed by His Honor, the Mayor, for a term of two years.

From my conversations with Mr. O'Connor I understand that it is the purpose of this request to ascertain whether or not the liability for the premium for the full term for which the bond is executed may be enforced. Of course, you understand that the City of Chicago as the obligee does not make application for a fidelity or surety bond but that the application for such a bond is signed by the principal or the official appointed or elected. The only method by which the premiums have been paid in the last few years has been through an appropriation by the City Council to the comptroller's office under the heading of "Miscellaneous Items." It is out of this fund that the city comptroller pays the premiums on surety bonds for public officials. These bonds are executed by the principal and the surety company for the period and term for which the appointment is made or the official elected unless a vacancy occurs either by death, removal or resignation of the official before the expiration of the term for which he is appointed or elected. The bond, therefore, is a continuing bond for the full period of such appointment or election and cannot be cancelled by the comptroller excepting as is provided in Section 37 of The Chicago Code of 1911 and then only in the event that "any or all of the sureties on any such bond are insolvent or will be unable to respond in damages in case any liability shall arise upon such bond." There is no provision in the statute that empowers the comptroller to cancel official bonds but provision is made for the cancellation of such bonds and

the release of surety, by request of the surety, under Section 10 of Chapter 103, Hurd's Revised Statutes, 1911.

We are of the opinion, therefore, that the fidelity or surety bonds which have been heretofore executed and filed for such officials as have heretofore been appointed by His Honor, the Mayor, cannot be cancelled by the comptroller without the consent of the surety company before the expiration of the period or term for which such appointment was made. That being the case there can be no release of the premium without the consent of the surety.

Very truly yours,

DAVID T. ALEXANDER,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Licensing of Motor Vehicle Chauffeur.

May 9, 1916.

HON. CHARLES C. HEALEY, General Superintendent of Police.

Dear Sir:

Your communications relative to the arrest of Mr. E. M. Lawler, an employe of the Chicago Telephone Company, and also Mr. William Sparrough, an employe of the Department of Public Works of the City of Chicago, both of whom were arrested for operating motor vehicles (incidental to their usual occupation) without having obtained a chauffeur's license under the terms of the Motor Vehicle Act of 1911, as amended June 29, 1915, and in force January 1, 1916, have been referred to me for opinion.

In reply thereto, beg to state that the Motor Vehicle Act, Section 13, provides for the licensing of chauffeurs and defines who is a chauffeur within the meaning of the act.

“SECTION 13. * * * any person operating a motor vehicle as a mechanic or employe, and any person regularly operating a motor vehicle for hire or pecuniary profit, etc. * * * is a chauffeur * * *.”

It will be noted that Section 13 defines who shall be a chauffeur and practically divides such persons into three groups or classes. First, those who operate motor vehicles as "mechanics"; second, as "employees" and thirdly, as "any person regularly operating a motor vehicle for hire or pecuniary profit."

To determine whether or not Messrs. Lawler and Sparrough are chauffeurs within the meaning of the act, we must necessarily construe Section 13, above referred to, reading it in connection with the entire Motor Vehicle Act.

The third group or class of persons referred to in the paragraph above hardly requires any discussion, inasmuch as the intention of the Legislature is clear and the language used unambiguous.

"Mechanics" and "employees" who operate motor vehicles are either persons *who occasionally use a motor vehicle* or persons *who use a machine incidental to their regular employment* or persons *who operate a machine as a regular occupation*.

Directing your attention principally to the particular class under which I believe the above mentioned persons would come, it is necessary to define the term "employee." The word "employee" is derived from the French word "employé" and means one who is employed. The word "employee" is co-related to the word "employer."

36 New York Supreme, 525.

5 New York Supreme, 95-96.

The word has been further defined by Webster and others as meaning one who is employed or works for wages or salary. Mr. Lawler is an employee of the Chicago Telephone Company, a private corporation, while Mr. Sparrough is an employee of the City of Chicago, a municipal corporation. The word "employee" used in the statute is used in a broad sense and not being restricted by any other language must be construed to mean any person or persons who act in the capacity of an employee to any person or corporation. The fact that the above named persons perform other services for their employer and that the operation of the motor vehicle

is but incidental to their regular employment, is immaterial. The Motor Vehicle Act is a regulatory act enacted principally for the protection of the general public and it is just as necessary to license persons who operate such motor vehicles as are being operated by Messrs. Lawler and Sparrough as it is to license any other commercial motor vehicle. The act makes no distinction between private and municipal corporations and in Section 15a thereof provides:

“No person or corporation shall employ, *as a chauffeur or operator of a motor vehicle*, any person not specially licensed as aforesaid.”

Thus it can be readily seen that no person or corporation whether private or municipal can employ any person as an operator of a motor vehicle without the said person first having procured a license in accordance with Section 13 of the Motor Vehicle Act.

I am, therefore, of the opinion that all such persons who operate motor vehicles in Chicago incidental to their usual employment must procure a chauffeur's license under the terms of the Motor Vehicle Act, as amended and in force January 1, 1916.

Yours very truly,
DANIEL A. ROBERTS,
Assistant Corporation Counsel.

Approved:
SAMUEL A. ETTELSON,
Corporation Counsel.

Approval of Pay Roll for Services of Col. Henry A. Allen.

May 11, 1916.

HON. WILLIAM R. MOORHOUSE, Commissioner of Public Works.
Dear Sir:

Replying to your communication of April 13th, relative to approving the pay rolls for the Bureau of Engineering, upon which the name of Col. Henry A. Allen appears as having performed the duties pertaining to a position in said

bureau entitled "Mechanical Engineer in Charge," when in fact, as stated in the letter of the city engineer attached to your communication,

"For over two years Col. Allen has been detached from the Bureau of Engineering, and is devoting his entire time to the designing of garbage reduction and incinerating plants for the Department of Health, and Col. Allen is not devoting any of his time to the operating division, which is and has been for about two years under the direct supervision of an assistant mechanical engineer,"

we would say that, because of the provisions hereinafter set forth, contained in an ordinance passed March 31, 1916, by which various amounts, including the amount appropriated for said position for the year 1916, were appropriated from what is commonly known as the "Water Fund," it appears to us said position is undoubtedly existent and included in the classified service of the city, and was created, established and continued in force for purposes exclusively pertaining to the water supply of the city. Section 6 of said ordinance, as set forth on pages 4174 and 4175 of the Council Proceedings of March 31, 1916, reads as follows:

"SECTION 6. That the offices and places of employment hereinafter named (except such offices and places as are created by statute) where heretofore created and established, be and are hereby continued in force, and where not heretofore created and established are hereby created and established, in the service of the City of Chicago, and that the respective salaries for such offices and places be fixed at the sums hereinafter specified for them respectively. Unless otherwise provided by statute or ordinance, such offices and places shall be filled by appointment by the head of the department to which the particular office or place to be filled belongs, in accordance with the provisions of the City Civil Service Act."

Among other things contained in said ordinance, the following appears of record on page 4182 of the Council Proceedings of March 31, 1916:

“BUREAU OF ENGINEERING
“APPROPRIATION FROM WATER FUND.”

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*

“SUPERINTENDENCE OF PUMPING STATIONS AND CRIBS.

“Salaries and Wages—

“Mechanical Engineer in Charge.....\$7,500”

In view of the fact that Col. Allen was certified and appointed to said position in conformity with the provisions of the Civil Service Act, it would seem to us that any transfer or leave of absence, which in this case appears to have occurred in fact if not in the manner provided by law, should, in accordance with the provisions of said act, be reported to the Civil Service Commission, and inasmuch as it appears that Col. Allen was and is not performing the functions and duties of the position to which he was certified and appointed, we are unable to conclude that you would be acting in conformity with the provisions of said act, were you to attempt to approve the payment of or be in any manner concerned in paying Col. Allen any salary or compensation out of the amount appropriated for said position.

In addition to the matters involved pertaining to the Civil Service Act, the further fact that the money appropriated for this position is taken from out the water fund, presents for our consideration another and equally important phase of the situation.

In the case of *People v. Hummel*, 215 Ill. 71, it was held that Sections 13 and 32 of the Act of 1863, revising the Special Charter of the City of Chicago and requiring the city treasurer to keep money received from water-loan bonds, water rents, or otherwise, for the water works of the city, in a separate fund and prohibiting its use for any other purpose than that for which it was received, were not abrogated by the city's adoption of the General Incorporation Act of 1872, but are in full force and effect; on page 75 the court said:

“The provision of the general act of 1872 investing the City Council with power to control ‘the finances and property of the corporation’ does not, by any rule of construction of which we are advised, contravene those pro-

visions of Sections 13 and 32 of the charter of 1863 forbidding the use or appropriation of the water fund to objects and purposes other than those for which the same was collected by the city from the consumers of water."

The provisions of said Section 13, which the court held are still applicable and in force in the city, read as follows:

"* * * * that all funds derived from the sale of the said water loan bonds, or from water rents, or otherwise, for the water works of said city, shall be *exclusively used* and appropriated by said board to the *objects and purposes* pertaining to the water supply of said city, herein specified, nor shall the same, or any part thereof, be used by the said board, or by the said city, *for any other purpose.*"

Said Section 32 reads as follows:

"All accounts pertaining to the water works of said city shall be kept separate and distinct from the accounts pertaining to other departments of said board; and all moneys deposited with the city treasurer on account of the water works shall be by him kept separate and distinct from all other moneys, as the water fund, and shall only be applied for the uses and purposes for which the same are received; and such moneys shall be held by the treasurer of the city as a special fund, separate and distinct from other funds; and he shall be deemed guilty of embezzlement if he shall pay out such moneys for any account other than that belonging to such water fund, and shall be liable to indictment for so doing."

For aught we know some good reason may exist which would authorize an appropriation from the water fund for the use and benefit of the Health Department, but, in this instance the appropriation in question was not made for the use of the Health Department but for a purpose for which said fund was lawfully intended and separate and distinct from the Health Department; and a careful and exhaustive search of the law and ordinances pertaining to the use and appropriation of said fund, fails to reveal any authority for the appropriation or diversion of said fund to the use of the Health Department.

It would seem to us that to approve said pay rolls and thus charge the expense for such services as were rendered

by Col. Allen in this instance, to the appropriation for said position of "Mechanical Engineer in Charge," would constitute the commission of an act which would tend to divert said fund to a use or purpose other than that for which it was lawfully intended; in view of which we are of the opinion that the approval of said pay rolls would be illegal.

Yours respectfully,

H. C. FOSTER,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Where Legislative Matters May Originate.

May 13, 1916.

HON. HERMAN E. MILLER, Alderman 20th Ward.

Dear Sir:

Answering your verbal inquiry as to whether or not all matters pertaining to ordinances, resolutions, orders, etc., must originate on the floor of the City Council, we beg to advise you that this is purely a matter of the organization of the legislative body. The body at its first meeting adopted the rules of procedure governing its action and the City Council, on April 26, 1916, adopted its rules of procedure, and by Rule 46, appearing on page 9 of the printed Journal of the Proceedings of the new City Council the following rule was adopted:

"RULE 46. All ordinances, petitions, resolutions, orders and communications to the Council shall, unless by unanimous consent, be referred to appropriate committees, to be decided by the chair, and only acted upon by the Council at a subsequent meeting, on the report of the committee having the same in charge."

It will readily be seen from the language used in the foregoing rule, that all matters pertaining to legislative action

on the part of the City Council must originate on the floor of the council and be sent to a committee unless by unanimous consent it be passed without referring it to a committee.

Section 53 provides that the rules adopted may temporarily be suspended by a two-thirds vote of the aldermen present, "but shall not be repealed, altered or amended unless by concurrence of two-thirds of all of the aldermen entitled by law to be elected."

It follows, therefore, that these rules may be suspended for any temporary purpose and that under this construction a rule is flexible enough to permit the consideration and a vote thereon of any matter originating in the committee by a two-thirds vote of the aldermen present, but none of the rules as passed, shall be repealed or amended without the affirmative vote of two-thirds of the aldermen elected.

Very truly yours,

DAVID T. ALEXANDER,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Permits for Sub-Sidewalk Space.

May 13, 1916.

TO THE HONORABLE, THE CITY COUNCIL OF THE CITY OF CHICAGO:

Gentlemen:

On March 1, 1916, the following order was passed by your Honorable Body (page 3383 of the Proceedings of said meeting):

"WHEREAS, it is reported that in numerous instances sidewalk space, sub-sidewalk space, alley space, sub-alley space, street space and sub-street space throughout the City of Chicago is being privately used for boilers, coal bunkers, gasoline wells and sundry other purposes without the requisite permit being secured and the prescribed compensation paid to the proper city officials; and,

“WHEREAS, the use of such space under the circumstances indicated above is contrary to the law, and results in a financial loss to the City of Chicago; therefore,

“BE IT ORDERED, That the corporation counsel be and he is hereby directed to advise the City Council as to what legal steps can be taken to cause the persons, firms or corporations using for private purposes the space hereinabove mentioned to take out the necessary permits and pay such compensation as may be required therefor under the law.”

Regarding the above, we beg to state as follows:

In the matter of sub-sidewalk space, Section 2299 of The Chicago Code of 1911, as amended, provides, in substance that no person shall use any sub-sidewalk space without first obtaining a permit so to do from the commissioner of public works.

Section 2300 provides:

“2300. APPLICATION—NO PERMIT FOR SPACE UNDER ROADWAY.) Applications for such permits shall be in writing, stating specifically the space desired, its length, breadth and depth, the use intended to be made thereof, and the structure to be built therein. No permits shall be issued hereunder for the use of any space under the surface of the roadway of any street or other public ground.”

Section 2301, as amended, requires the filing of an indemnifying bond and specifies certain other conditions under which a permit for the use of sub-sidewalk space shall be issued.

Section 2302, as amended, provides in part as follows:

“2302. The fee to be charged for permits issued under this article by the commissioner of public works shall be based upon the the number of cubic feet occupied by the vault, space, or structure, under the surface of the sidewalk, street or other public ground, for which said permits are given. Any applicant for a permit desiring to use any such vault, space or structure of three thousand cubic feet or less may, if he makes and files a statement with the commissioner of public works at the time his application is filed that he has measured the space which he desires to use and that the same is not more than three thousand cubic feet, be issued a permit

without charge. If no such statement be filed, or if the vault, space or structure occupied is more than three thousand cubic feet, the permit fee shall be at the rate of five dollars for the first four thousand cubic feet or fraction thereof, and one dollar for each additional one thousand cubic feet, or fraction thereof, under each permit. This fee shall cover the permit for such space, vault or structure, and for any coal holes, trap-doors, or other openings connecting with the same. * * *

It is therefore seen that persons who are making use of sub-sidewalk space without having secured a permit can be compelled to obtain the requisite permit and pay such fee therefor as may be required by Section 2302 above quoted, under penalty of being compelled to vacate the space so occupied in the event of failure to procure a permit.

Concerning the question of compensation—in addition to permit fee—for the private occupation of sub-sidewalk space, will say that no such compensation is provided for under the present ordinances, as Section 2302 of The Chicago Code of 1911, which provided for the payment of annual compensation for the private use of sub-sidewalk space, was amended by the City Council on January 29, 1912 (page 2679 of the Journal of the Proceedings), so as to eliminate the annual compensation feature of same. This action was taken in consequence of the decision of the Supreme Court in the case of *Ryerson v. City of Chicago*, 247 Ill. 185 (and seven other similar cases reported in 247 Illinois), wherein the court held that when the fee of the street is vested in the city, the owner of an abutting lot has no right to use the sub-sidewalk space, unless permission for such use be given him by the city, and that the city may charge him rent for the privilege of so using the sub-sidewalk space; but that where the fee of the street is in the abutting owner such owner has the right to use the space beneath the surface without paying any rent to the city so long as the city is not itself using or does not desire to use such space for legitimate street purposes.

As is indicated by the Supreme Court decision above referred to, there is nothing to legally prevent the City Council

from passing an ordinance requiring abutting owners to pay compensation for the use of sub-sidewalk space where the fee of the street is vested in the city.

Relative to the question of sub-street and sub-alley space, the same legal principle is applicable thereto as in the case of sub-sidewalk space, as the Supreme Court in the case of *The J. Burton Company v. The City of Chicago*, 236 Ill. 383, held that there is no distinction, in law, between a public street and a public alley, and that the power and jurisdiction of the city over the public alleys of the city are identical with its power and jurisdiction over the streets of the city.

There are no general ordinances providing for the private use of sub-street and sub-alley space, however, but the City Council is clothed with the requisite legal power to pass an ordinance of this character, the provisions of which should be in conformity with the law as laid down in the case of *Ryerson v. City of Chicago*, 247 Ill., hereinabove referred to.

It is the custom of the City Council to pass special ordinances allowing the use of sub-street and sub-alley space and to exact compensation for this privilege wherever possible.

As to the private use of the surface of streets, alleys and sidewalks, our Supreme Court decisions have ruled more strictly with reference to encroachments on the street above the surface of the ground than to encroachments beneath the surface. The general rule has been stated as follows:

“The right of the public to use the streets for purposes of travel and transportation is the paramount one and that of the abutter to occupy them for other purposes is a permissive and subordinate one.”

28 Cyc. 859.

Brauer v. Balt. Refr. Co., 66 L. R. A. 403.

Under this rule it has been uniformly held that while abutting owners may use the street in any manner not inconsistent with the right of the public, they cannot so use it as to interfere with the convenience of the people.

From the above it is seen that any private use of streets, alleys and sidewalks (whether a permit has been obtained or not) which results in a deprivation of the public right to the

unobstructed use of the same, is in contravention of the law and the city would have no legal power to acquiesce in a continuation of such use or issue a permit where none had been obtained, and charge compensation therefor.

The City Council has from time to time passed special ordinances authorizing the private use of streets, sidewalks and alleys consistent with the rights of the public to use them for travel and transportation purposes, and has required the payment of compensation in connection therewith.

Respectfully submitted,

JOHN A. COOKE,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTTELSON,
Corporation Counsel.

Sunday Closing of Barber Shops.

May 17, 1916.

HON. OTTO KERNER, Chairman, Judiciary Committee.

Dear Sir:

We are in receipt of an order passed by your committee on May 15th, 1916, requesting an opinion from this office on the validity of an ordinance providing for making it unlawful for any person or persons to keep open barber shops or to carry on the business of shaving, hair cutting or tonsorial work on Sunday within the City of Chicago. The precise question raised by this order has been passed on by our Supreme Court in the case of *City of Marengo v. Rowland*, 263 Ill. 531. In that case the court had under consideration the following ordinance:

“Sec. 1. That hereafter it shall be unlawful for any barber shop or shops, tonsorial parlor or parlors, to be opened for business on the first day of the week, commonly called Sunday, nor shall any tonsorial business be done in any of said shops or parlors on said first day of the week. A violation of the provisions of this ordinance shall subject the offender to a penalty of not less than

ten dollars (\$10) and not exceeding the sum of twenty-five dollars (\$25) for each offense. The term Sunday, under this ordinance, shall include the period between the usual closing hour on Saturday night and twelve (12) o'clock midnight on the following night."

And at page 532 the court said:

"This court, in *Eden v. People*, 161 Ill. 296, held unconstitutional a statute substantially like the ordinance here in question. Counsel on both sides concede that unless that decision is overruled or can be distinguished the decision of the Circuit Court must be upheld. Counsel for appellant, however, contend that this court, in effect, has overruled that decision in *City of Springfield v. Richter*, 257 Ill. 578, *City of Clinton v. Wilson*, 257 *id.* 580, and other recent cases of like character. With this we do not agree. In the two cases just cited, ordinances were construed which forbade, generally, the keeping open of business places or pursuing ordinary day labor on Sunday, but containing provisos excepting persons who usually observe some other day of the week as the Sabbath, and excepting cases of necessity, hotels, eating houses, drug stores, and certain other enumerated lines of business. In every case in this state relied upon by counsel for appellant as not being in harmony with *Eden v. People*, *supra*, there was no attempt to overrule, in terms, the latter case. On the facts and the law every one of those cases is readily distinguishable. *It requires no argument to prove that there is a well marked difference between an ordinance which forbids all secular business on Sunday, with certain clearly defined and reasonable exceptions, from one which picks out one particular business and forbids it being exercised on Sunday but permits all other kinds of business.*

* * * * *

"Under the Cities and Villages Act no provision is found granting to municipalities, in express terms, the authority to prohibit labor on Sunday and set that day apart as a day of rest. Clause 66 of Section 1 of Article 5 of the Cities and Villages Act (Hurd's Stat. 1911, p. 266) gives the power to incorporated cities and villages to regulate the police of the city or village and pass and enforce all necessary police ordinances. It was under this general grant of power that this court upheld ordinances prohibiting, generally, the engaging in business on Sunday, with certain reasonable exceptions, in *McPherson v.*

Village of Chebanse, 114 Ill. 46, *City of Springfield v. Richter*, *supra*, and *City of Clinton v. Wilson*, *supra*. Said Section 1 of Article 5 was amended as to several clauses and the entire section re-enacted in 1911 (Laws of 1911, p. 173), but no change was made in said clause 66 or any other clause that in any way enlarged the authority of municipalities on the question here under consideration. It must be assumed that the Legislature then had in mind the ruling of this court in *Eden v. People*, *supra*, and therefore did not intend to extend the authority of municipalities on this question. The present statutes and general laws of the state should be construed in the light of that decision."

And again on page 535 the court said:

"The decisions cited from other jurisdictions by counsel for appellant need not be considered. Most of them were in relation to laws very similar to the English statute heretofore referred to. Moreover, with few exceptions, the acts or ordinances construed were general in their nature, substantially similar, in wording, to the ordinances in *McPherson v. Village of Chebanse*, *supra*; *City of Springfield v. Richter*, *supra*, and the *City of Clinton v. Wilson*, *supra*. The fact barbers were included in those lines of business prohibited in the ordinance in *City of Springfield v. Richter*, *supra*, and were in the excepted classes in *City of Clinton v. Wilson*, *supra*, does not render those two decisions inconsistent with each other or with *Eden v. People*, *supra*. In those two cases, in harmony with a long line of other decisions rendered by this court, it was held that a law or ordinance applicable to a certain class or classes of citizens, to be constitutional must be based upon some substantial difference between the situation of such class or classes and other individuals or classes to which it does not apply. In *Eden v. People*, *supra*, it was held that there was no substantial difference in the business done by barbers from that done in many other lines of employment, while in the other two cases just referred to it was held that there was a substantial difference existing in the classes of employment and business embraced within the prohibition in the ordinance and those excepted from such prohibitions."

This order relates solely to the operation of barber shops and I take it that the question raised is whether this business

can be prohibited on Sunday without a general prohibition against all business. With this in view it is very evident that our Supreme Court in the Rowland case has held that this would be class legislation and could not be upheld.

, Very truly yours,
 GEORGE A. CURRAN,
 Assistant Corporation Counsel.

Approved:
 SAMUEL A. ETTELSON,
 Corporation Counsel.

**Extension of Time on Great Lakes Dredge & Dock Company
 Contracts.**

May 18, 1916.

HON. WM. R. MOORHOUSE, Commissioner of Public Works.

Dear Sir:

We have your letter of May 13th transmitting certain correspondence touching the matter of extension of the time for completion of contracts of the Great Lakes Dredge & Dock Company for the construction of the substructure of the Webster avenue bridge, substructure of the Belmont avenue bridge and the superstructure of the Belmont avenue bridge, respectively, together with form of extension agreement to be signed by the commissioner of public works, and asking for an opinion as to whether or not the procedure outlined in such correspondence is proper and legal.

Our courts have held that an extension of the time for completion of work under a contract may be made directly or by implication before the time limit has expired for the completion of such work, but where a liquidated damage clause appears in the contract the city cannot waive such damages as accrue under the clause after the time limit has expired.

In the case of *Ludlow Valve Manufacturing Company*, 181 Ill. App. 388, the City Council attempted to extend the time for completion of the work to be performed under the

contract in question after such time had expired. The court, in deciding that question, at page 394 says:

“The record shows that the form of proposal and the specifications furnished to bidders who bid for the contract in question contain the clause regarding liquidated damages for delay in delivering the materials. It must be assumed that the price bid for furnishing and delivering the valves was bid by appellee with this provision in mind. It cannot be said that this provision did not form a material part of the consideration for the contract. Presumptively, at least, the price bid would have been less but for this clause in the contract. The price having been thus fixed upon the basis of a delivery within the time specified in the contract, it follows that when appellee failed to comply with that condition the city did not receive, and appellee did not furnish, that part of the consideration for the contract. Hence, appellee was not thereafter entitled to receive that part of the agreed price which it had itself agreed should be deducted therefrom in case of its failure to comply with that part of its contract. The right to make the stipulated deduction had accrued to the city at the time the council orders were passed. This was a property right, which then had a value of \$1,000 to the city. The City Council had no power to give away this property, or otherwise dispose of it without consideration. To hold that the ‘orders’ passed by the City Council after the right of the city to make the specified deduction from the contract price had become fixed amounted to a waiver or relinquishment of that right, would be to give judicial sanction to the making of a pure gift of the sum of \$1,000 to appellee out of the public treasury.”

From the correspondence accompanying your letter, it appears that the time limit for the completion of the substructure of the Webster avenue bridge expired April 2, 1915; for the Belmont avenue bridge substructure the time limit fixed was June 18, 1915, and it is not stated what the time limit was as to the completion of the superstructure of the Belmont avenue bridge.

Under the rule laid down in the Ludlow Valve Manufacturing Company case, we are of the opinion that the commissioner of public works cannot now legally extend the time for completion, but the question of damages accruing under

the contract is one for determination from the facts in each case as applied to the conditions of the contract.

Very truly yours,

EDWARD H. WRIGHT,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Consequential Damages to Non-abutting Property Owners Caused by Track Elevation.

May 19, 1916.

ANDREW LINN BOSTWICK, Esq., Municipal Reference Librarian, #206 City Hall, St. Louis, Mo.

Dear Sir:

Under date of February 15, 1916, a letter was received from you addressed to the department of track elevation, requesting certain information relating to track elevation problems in Chicago. This communication has recently been referred to me for attention. I herewith submit the following in reply thereto:

Question 1. Has the City of Chicago, or have the railroads ever been required to pay consequential damages to owners of property not abutting on the railroads' right-of-way as a result of track elevation?

Answer: I shall say *yes* to this question.

As a general rule neither the railroad company nor the city requiring the elevation of railway tracks is liable for damages which directly or necessarily result from the elevation of the tracks on the railroad's right-of-way.

Kotz v. Illinois Central R. R. Co., 188 Ill. 578.

City of Chicago v. Webb, 102 Ill. App. 232.

Osburn v. City of Chicago, 105 Ill. App. 217.

Carbine v. Illinois Central R. R. Co., 194 Ill. 81.

Damages have been paid to owners of property where the street or the alley has been depressed in order to make a

proper approach to the subway under a track elevation and where these damages are paid it is a question for the jury to decide whether or not the benefits to the property are greater because of track elevation than the damages. If the jury decides that the damages are greater than the benefits, then the city will probably be liable.

Following question one in your letter you say: "It seems possible that in some cases a track elevation project might be carried out, and owners of residences nearby might claim that their property had been depreciated in value on account of the unsightliness of the railway structure or embankment, even though the said property was not actually contiguous to the railroad." Then follows—

Question 2. If such damages were ever paid, were they paid by the city or by the railroad? Were they paid as the result of an agreement or were they awarded by a court or commission?

Answer: So far as I can ascertain no such damages have been paid in Chicago. Unsightliness of the railway structure or embankment caused by track elevation is *damnum absque injuria*. Cases of a similar nature, such as obstruction of light and air, have been before the court in Illinois and the court has said in our most familiar case in point, that obstruction of light and air, and increase of noise, smoke, cinders, etc., due to track elevation is *damnum absque injuria*, at least, as against a purchaser who takes through the party who granted the right.

Kotz v. Illinois Central R. R. Co., 188 Ill. 578.

Noise and vibration are proper elements of damage to be taken into account, in so far as they affect the market value, even when the railroad is running on its own right-of-way, except where it crosses streets.

Chicago, Milwaukee and St. Paul Ry. Co. v. Darke, 148 Ill. 226.

Chicago, Peoria & St. Louis Ry. Co. v. Nix, 137 Ill. 141.

Calumet, etc., Dock Co. v. Morawetz, 195 Ill. 398.

Illinois Central R. R. Co. v. Turner, 194 Ill. 575.

Then there is a long line of decisions which say that noise and vibration are not proper elements of damage to be taken into account, even in so far as they affect the market value where the railroad is running on its own right-of-way and is conducted with reasonable care.

Aldrich v. Metropolitan Ry. Co., 195 Ill. 456.

Illinois Central R. R. Co. v. Trustees of Schools, 212 Ill. 406.

But anything which affects the market value is proper and to be considered when the railroad is in the street.

Aldis v. Union Elevated R. R. Co., 203 Ill. 567.

It will be seen from the foregoing cases that the decisions on the question of noise and vibration are quite contradictory in Illinois. However, it is presumed that the later decisions will control.

It may be further noted that the cases above referred to seem to imply that vibration is governed by the same rule as noise, unless and until it can be shown to have done actual physical damage to the property.

As the last part of question two is also covered in your next question, I shall answer both at the same time.

Question 3. What is the general policy of the city or the railroads in awarding damages to the owners of manufacturing property abutting on the railroad right-of-way? "We should like to know whether this matter is governed specifically by law, and whether such damages are paid by agreement or on award by the court or commission."

Answer: The above question involves a general discussion of the track elevation problems. Therefore, I shall answer it by outlining the law and citing some of the cases.

(a) The right to enforce track elevation is one of police power. A track elevation ordinance may be passed, therefore, in pursuance of the police power of a municipality in order to protect the public welfare, aid the public safety and to eliminate the danger attendant to grade crossings.

Osburn v. City of Chicago, 105 Ill. App. 217.

Chicago & Alton R. R. Co. v. Carlinville, 200 Ill. 314.

(b) While the railroads could be compelled to elevate their tracks through the police power, thus far in Chicago the track elevation ordinances passed have been contractual in their character and provide that the railroads shall elevate their tracks at the expense of the railroads, but the damages arising from such track elevation shall be borne by the city.

(c) Railroad companies may be required, at their own expense, to abolish existing grade crossings.

Chicago, etc., Ry. Co. v. Minneapolis, 232 U. S. 430.

New York, etc., Co. v. Bristol, 151 U. S. 556.

Mo. Pac. Ry. v. Omaha, 235 U. S. 121.

This power is subject to the limitation that the ordinance requiring track elevation must be reasonable; but a city has wide discretion and the ordinance must be clearly unreasonable before a court will interfere.

Chicago v. P. C., etc., Ry. Co., 244 Ill. 220.

Murphy v. C. R., etc., Ry. Co., 247 Ill. 614.

People v. Grand Trunk Ry. Co., 232 Ill. 292.

In ordering track elevation, a city exercises a governmental function and is therefore not liable for negligence; this is so, although the ordinance may also become a contract by acceptance.

Murphy v. C. R., etc., Ry. Co., 247 Ill. 614.

The fact that an ordinance requiring track elevation is accepted by the company, and thereby becomes a contract does not prevent it from being an exercise of the governmental function of the city.

Murphy v. C. R., etc., Ry. Co., 247 Ill. 614.

(d) In Chicago the track elevation ordinances fix the plane or height at which the railroads shall elevate their tracks. The plane thus fixed in many cases is not high enough to allow street cars, etc., to pass beneath the elevation, and consequently subways are built under the tracks and the streets leading to these subways are depressed. Therefore, most of the suits against the city are brought because of the depression of the streets caused by track elevation.

(e) Chicago has no particular policy in awarding damages to the owners of manufacturing property, other than

the policy pursued in reference to all property owners of any character who have property abutting upon or adjacent to the railroad right-of-way. Owners of property abutting upon or adjacent to the railroad's own right-of-way cannot recover damages, because of track elevation alone.

(f) There have been, however, a special line of cases which affect manufacturing and business property where such property enjoys switch track connections.

In Illinois no damages are recoverable for temporary interference with switch track connections during the work of elevating the tracks.

Chicago Flour Co. v. City of Chicago, 243 Ill. 268.

Lefkovitz v. City of Chicago, 238 Ill. 24.

Osgood v. City of Chicago, 154 Ill. 194.

A more recent case goes still further and says that no damages are recoverable for cutting off permanently of a switch track connection by track elevation.

Otis Elevator Co. v. City of Chicago, 263 Ill. 419.

(g) In reference to your inquiry as to whether damages in track elevation matters are paid by agreement or on award by the court or commission, would say that it is the present policy of the corporation counsel to insist upon all cases of this class being adjudicated by the courts. Our office stands against settlements out of court. This rule is working out so effectively that from May 1, 1915, to May 1, 1916, the city paid out only about nine thousand dollars (\$9,000) in damages because of track elevation.

It might be well for you to keep in mind that our cases in Illinois which have been quoted above are based upon the Illinois constitution, which, I understand, is quite different from the constitution of your state in regard to the special matter under consideration.

Therefore, the cases which I have cited may not all be applicable to the constitution in your state. However, I am glad to be of service to you in this matter. I am

Yours sincerely,

CLIFFORD G. ROE,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Obstruction of Sidewalks.

May 19, 1916.

HON. WILLIS O. NANCE, Chairman, Committee on Health.

Dear Sir:

We are in receipt of a letter from "Friend of the People," Chicago Tribune, in re request of Mr. A. S. McCallister, No. 2901 Washington boulevard.

Mr. McCallister's statement and query are as follows:

"In a certain factory district of this city the sidewalk is being used for the purpose of putting together steel smokestacks and other structural iron. The noise caused by the welding makes it very difficult for neighboring concerns to hear readily.

"Will you kindly advise if this concern has a right to use the sidewalk for this purpose?"

In reply thereto we beg to state that the subject matter of this letter is governed by several sections of The Chicago Code of 1911.

Section 2320 of the Code provides that no person, while receiving or delivering goods, etc., shall permit the same to remain on the sidewalk longer than is necessary to convey such goods, etc., to or from the premises abutting on such sidewalk, or to or from which such goods, wares or merchandise are being delivered or received. It also provides that for that purpose he shall not occupy over four feet of the outer edge of the sidewalk in front of his store or building.

Section 2321 prohibits the storage of personal property, goods, wares or merchandise of any kind or description whatsoever upon any street, alley or sidewalk.

Sections 2320 and 2321 provide a penalty of not less than five dollars nor more than ten dollars for each offense.

Section 2336 of the code provides that it shall be the duty of the general superintendent of police to see to the enforcement of each and every provision of the code relating to sidewalks, and that each and every police officer shall,

whenever there is any obstruction in any street, alley or sidewalk, endeavor to remove the same, and in case such obstruction shall be of such a character that the same cannot readily be removed then such policeman shall report the same to the Department of Public Works and said department shall remove same.

Section 2434 of the code provides for the removal of all obstructions from streets, alleys, etc., after six hours' notice from the commissioner of public works.

Section 2442 prohibits the depositing or placing in the streets of any lumber or other material, and prohibits the loading or unloading of any car from the street. It also prohibits the erection or maintenance of any switch-house or any other building upon any street, highway or alley within the city except by permission of the commissioner of public works, given in accordance with the provisions of the ordinances of the City of Chicago. It further provides a fine of from five to ten dollars for each violation of the foregoing provisions.

The above are the sections of The Chicago Code of 1911 which cover the complaint of Mr. McCallister.

Yours very truly,

GEO. A. CURRAN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Riparian Rights on Lake Calumet.

May 19, 1916.

HON. T. O. WALLACE, Alderman, Twenty-third Ward, City Hall.

Dear Sir:

Under date of May 17th you addressed a letter to the corporation counsel asking his opinion in case of condemnation proceedings to take the riparian rights on Lake Calu-

met if it would not be considered a benefit to the remaining property by developing the lake to be used for harbor purposes, and if the court will take this into consideration in granting the awards to the property owners for their riparian rights.

The Supreme Court has laid down a rule upon this subject in the case of *Washington Ice Company v. City of Chicago*, 147 Ill. 327, at page 330 as follows:

“The constitution provides that private property shall not be taken or damaged for public use without just compensation. For land taken no benefits to land not taken can be set off, but payment of the compensation for the damages accruing to the land not taken may be made in benefits to the property, not common to the other property affected,—that is, the special benefits accruing to the particular property may be set off against the damages done to land not taken by the improvement, so that if the special benefits equal or exceed the damages, the owner can recover nothing as damages to property not taken; if less, he will recover the difference, only. The constitutional provision is equally mandatory that property shall not be damaged for public use without just compensation, as it is that it shall not be taken for such use without just compensation, so that, in some one of modes prescribed, compensation must be made for damages to the property, arising from the improvement. These principles are so fundamental and familiar that the citation of cases is unnecessary.”

In this case the City of Chicago passed an ordinance for the opening of One-hundredth street from Commercial avenue to the east line of Section 7, Township 37, Range 15. The tract through which the street was to be opened was originally a swamp lying on the west or northwesterly shore of the Calumet River and passed through this pond or swamp a distance of 1,830 feet. The jury awarded compensation of \$13,500 for land actually taken and nothing for damages to land not taken. No evidence was introduced to show the grade of the proposed street, the width of the actual roadway or the material to be used, and the court held that the mere “paper opening” of the street

without improvement so as to make it available could be of but little practical benefit. And the court further held that the court below erred in instructing that in assessing damages to land not taken the jury should take into consideration and set off special benefits.

Similar cases are *City of Waukegan v. Burnett*, 234 Ill. 460, where an ordinance for sewerage purposes and condemnation thereunder was held invalid for failure to set out definitely the kind and construction of sewers; *City of Chicago v. Edens*, 264 Ill. 64, in which case the court affirmed the case of *Washington Ice Company v. City of Chicago*, *supra*, and held that the ordinance was void for similar reasons.

On the question of what is a riparian right the Supreme Court of the United States in *Yates v. Milwaukee*, 77 U. S. 497, said at page 504:

“This riparian right is property, and is valuable, and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and if necessary that it be taken for the public good, upon due compensation.”

In *Rumsey v. New York and New England Railroad Company*, 133 N. Y. 79, the New York Court of Appeals held that the respondent Rumsey was entitled to compensation for the riparian rights taken by the railroad. The plaintiff for more than twenty years had owned forty acres of land on the east bank of the Hudson River and on March 3, 1885, the State of New York granted to the railroad company the land under water adjacent to and in front of the uplands from the high water mark to the channel of the river—all in front of Rumsey's property—and the railroad built an embankment shutting off the property in question from the river but practically taking no actual property. In discussing the proper measure of damages the Court of Appeals, at page 620, said:

“The proper measure of damages in such a case is the diminished rental or usable value of the property

as it was, in consequence of the loss, by defendant's acts, of access to the river, in the manner enjoyed by the owner prior to the construction of the embankment across the water front by the defendant. The plaintiffs cannot be permitted to prove, or allowed to recover, damages that they might have sustained if they had put the property to some other use or placed other structures upon it. *Tallman v. Metropolitan Elev. R. Co.*, 121 N. Y. 119, 8 L. R. A. 173. The damages could not be based upon the rental or usable value of the property for a brick yard, any more than they could be based upon their use for some other specific or particular purpose to which they were not in fact put by the owners. The question is, What damages did the plaintiff in fact suffer by having the access to the river cut off? Not what they might have suffered had the land been devoted to some particular use to which it was not put.

"The proof of damages, on the part of the plaintiffs, consisted entirely of the opinions of witnesses as to the rental value of the land in the absence of the structure built by defendant. This proof was competent as far as it went, but it did not establish the legal measure of damages. It should also have been shown what was the rental or usable value of the premises as they were, with the obstruction which interfered with the access to the river, as the difference in these two sums represented the actual loss caused by the defendants."

To the same effect see *Waterford Electric Light, Heat & Power Company v. Reed*, 94 N. Y. Supp. 551, which was also a taking of property adjoining water frontage.

I am, therefore, of the opinion that in determining the compensation to be paid for the riparian rights taken, the court cannot consider the benefits that would accrue from the creation of a harbor within the lake and especially so if the exact kind and location of a harbor may not be fully determined prior to the condemnation proceedings; that if the owners of property whose riparian rights are condemned should seek, in addition to payment for such riparian rights, to collect damages from the city by reason of injury to

the property not taken, then the benefit to be derived to the property by reason of a harbor could be considered.

Very truly yours,

MORTON S. CRESSY,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Transfer of Submerged Lands Under Lake Calumet.

May 20, 1916.

HON. T. O. WALLACE, Alderman, Twenty-third Ward.

Dear Sir:

Under date of May 17th you requested the corporation counsel to give you an opinion as to what constitutes a majority vote in the City Council for the purpose of transferring or trading the submerged lands in Lake Calumet for the riparian rights.

Section 13 of Article 3 of the Cities and Villages Act, Hurd's Revised Statutes, 1913, page 267, provides:

"Provided, it shall require two-thirds of all aldermen elect to *sell* any city or school property."

In the O'Connor Harbor Act of July 1, 1913, the City of Chicago is in Section 1 granted the right to construct a harbor. In Section 5 the city is given the right to use, occupy, or reclaim all submerged lands under the public waters of the city within the limits or jurisdiction of such city or village and under the same section it is provided that no person or private corporation shall at any time after the act goes into effect construct any harbor * * * without first securing the consent of the City Council. Under Section 6 of the same act the city is given the right of possession of all artificially made or reclaimed lands and authorized to institute suit if necessary in its corporate name for the recovery of such artificially made or reclaimed

lands. Under Section 12 of the same act the city is authorized to acquire the lands of the riparian owners whether such lands be natural or artificial without other compensation than by agreeing with such owner or claimant upon a boundary line and in Section 13 provision is made that when the city and such owner or claimant have agreed upon a boundary line the city shall file a suit in chancery praying that such boundary line be established and confirmed by the court.

The ordinances to which you refer are ordinances authorizing the City of Chicago to enter into an agreement with riparian owners on Lake Calumet. If the ordinances be passed by the City Council and the agreement be signed by the riparian owners and by the city under the authority of said ordinances it will be necessary to file a bill for the confirmation of the agreement of the city. The question then arises as to whether in authorizing the city officials to enter into an agreement with the riparian owners the City Council is passing an ordinance to sell city property.

I have analyzed the O'Connor Harbor Act, Hurd's Rev. Stat. 1913, pp. 469-475, in detail, *supra*, because it seems to me that the state intended to vest in the city the submerged lands as well as the illegally reclaimed lands in Lake Calumet and that if the City Council authorized a settlement and adjustment with the riparian owners the city is giving away and selling submerged lands now belonging to the city in consideration of the release by the riparian owners of their riparian rights.

On July 15, 1915, the City Council passed an ordinance creating Harbor District No. 4 and directing the city authorities to take possession of all such submerged lands (Council Proceedings, 1915, pages 1416-1418), thereby accepting the O'Connor Harbor Act and applying the said act to Lake Calumet.

I am, therefore, of the opinion that the five ordinances relating to Lake Calumet transferring or trading the submerged lands in Lake Calumet for the riparian rights are a sale within the meaning of Section 13 of Article 3 of the

Cities and Villages Act and that, therefore, it is necessary that said ordinances should be passed by a two-thirds vote of the City Council.

Very truly yours,

MORTON S. CRESSY,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Frontage Consents for Junk Shops on Business Streets.

May 31, 1916.

ALDERMAN WILLIS O. NANCE, Chairman, Committee on Health.

Dear Sir:

Answering your verbal request as to the legality of an ordinance requiring a majority of frontage consents for the location of a junk shop, yard or store on a business street, or a street where the majority of the property or frontage is devoted to business, I beg to advise you that I have very carefully investigated this phase of your inquiry, but find that heretofore no decision has been rendered by our Supreme Court directly adjudicating this question, but there are quite a number of decisions which, by analogy and strong inferences state the law to be that such an ordinance, if passed, would be held an unreasonable and oppressive exercise of the police powers of a municipality.

While it is true that the Legislature under Clause 95 of Article 5 of the Cities and Villages Act, Hurd's R. S. 1915-1916, conferred authority upon municipalities.

“to tax, license and regulate second-hand and junk stores and yards, * * * and to direct the location thereof,”

it cannot be argued that the power “to direct the location” authorized the power to prohibit. That it would practically amount to a prohibition of the carrying on of a legitimate,

lawful business because such an ordinance would necessarily be oppressive, is admitted.

“A law which unnecessarily and oppressively restrains a citizen from engaging in any traffic, or disposing of his property as he may see fit, although passed under the specious pretext of a preservation of the health of the inhabitants, would be void. Such a law would be unreasonable, and would deprive the people of the rights guaranteed to them by the organic law of the land. * * *

“If the degree of the restraint is reasonable, and its necessity obvious, the ordinance imposing it is valid. But the restraint must not be such as to create a monopoly, or to entirely prevent any trade, the exercise of which is useful to humanity, so long as properly conducted. * * *

“Business investments, upon which the prosperity of a community depends, should be hampered by as few restraints as are compatible with the health and security of the people; and whenever any doubt exists as to the urgency of the necessity, or the dangerous character of the occupation, it should be resolved against the validity of the restraint.”

Horr & Bemis on Mun. Police Ord., Sec. 132.

Dillon on Municipal Corporations, Section 665, says:

“In the exercise of the power to regulate, a city may exercise all reasonable forms of restraint over the thing regulated so long as it stops short of actual prohibition. * * * It implies a power of restriction and restraint certainly within reasonable limits as to the manner of conducting a specified business. * * *

That a junk shop is a lawful, legitimate business, and is not a nuisance *per se* was decided by our Supreme Court in the case of *People v. Busse*, 240 Ill. 338, wherein the court, in its opinion, said (page 346):

“It is conceded that a junk store is not a nuisance *per se*. Such a store may be so conducted that it will not be more offensive to the physical senses than many other stores where commodities of like bulk are handled and dealt in which have not received the unfavorable attention of the lawmaker. It is, of course, true that if a junk store is conducted in such a manner as to be a

nuisance it may be absolutely prohibited by an ordinance passed under the power given to declare and abate nuisances, but that is because it is a nuisance and not because it is a junk store.”

Where the power to legislate on a given subject is conferred and the mode of its exercise is not prescribed, then the ordinance passed in pursuance thereof must be a reasonable exercise of the power conferred or it will be pronounced invalid.

People v. Erickson, 263 Ill. 368.

City v. Stratton, 162 Ill. 494.

Wice v. C. & N. W. R. R. Co., 193 Ill. 351.

Hawes v. City of Chicago, 158 Ill. 653.

City of Lake View v. Tate, 130 Ill. 247.

In the case of *City of Chicago v. Gunning System*, 214 Ill. 628, our Supreme Court held invalid an ordinance which provided “that no sign or bill-board shall be erected upon any boulevard or pleasure drive, or on any street where three-fourths of the buildings on such street are devoted to residence purposes, without the consent in writing of at least three-fourths of the residents and property owners on both sides of the street in the block where it is desired to erect such board.” The court held that this provision was an “arbitrary restriction on the part of the city, depriving an individual property owner of the use of his property as he may choose, without any showing that such use would be injurious to others in the same vicinity.”

Subsequently this ordinance was amended so as to require a majority of frontage consents only on streets where buildings are used exclusively for residence purposes. This latter ordinance was sustained by the Supreme Court in the case of *Cusack Co. v. City of Chicago*, 267 Ill. 344, as being a reasonable exercise of the police power of the city.

In the case of *People v. City of Chicago*, decided by our Supreme Court in 261 Ill. at page 16, it was held that an ordinance which required frontage consents for the construction or location of a store for the “sale, at retail, of goods, wares and merchandise on any street, in any block in which all the

buildings are used exclusively for residence purposes," was invalid as an unreasonable restriction and interference of one's rights which deprives the citizen of his liberty or property. In its opinion the court said (page 21):

"The owner of property has the constitutional right to make any use of it he desires, so long as he does not endanger or threaten the safety, health and comfort or general welfare of the public. This right cannot be wholly taken away or limited by the state except in so far as it may become necessary for individual rights to yield to the higher and greater law of the best interest of the public. (*Haller Sign Works v. Training School*, 249 Ill. 436.) There is nothing inherently dangerous to the health or safety of the public in conducting a retail store. It may be that in certain exclusively residential districts the owners of residence property would prefer not to have any retail stores in such blocks, but if such be the case it manifestly arises solely from aesthetic considerations, disconnected entirely from any relation to the public health, morals, comfort or general welfare. Legislation, either by the state or by municipal corporations, which interferes with private property rights or personal liberty, cannot be sustained for purely aesthetic purposes.

"We do not find it possible, under any view of the law, to sustain Section 712½ of the ordinance."

In the case of *People v. Village of Oak Park*, 266 Ill. 365, the validity of an ordinance requiring frontage consents for the erection and location of a livery stable, was there attacked. The court, in its opinion, in sustaining the ordinance said (page 367):

"In *City of Chicago v. Stratton*, 162 Ill. 494, the ordinance considered by the court made it unlawful for any person 'to locate, build, construct or keep in any block in which two-thirds of the buildings are devoted to exclusive residence purposes, a livery, boarding or sales stable * * * unless the owners of a majority of the lots in such block, fronting or abutting on the street, consent, in writing, to the location.' The ordinance required the consent of the property owners to be filed with the commissioner of buildings before a permit would be granted for the construction or keeping of such livery stable. A penalty was provided for the violation of the

ordinance and a suit was brought to recover the penalty. The validity of the ordinance was attacked upon the ground that the City Council was given power, by act of the Legislature, to direct the location and regulate the use and construction of livery stables, and that the council had by ordinance delegated that power to the owners of a majority of the lots in the blocks specified. The court held the ordinance was not invalid on that ground; that a statute empowering a city to direct the location of livery stables includes the power to prohibit or forbid their location within residence districts and to impose such conditions and restrictions in making such prohibition as the City Council may see fit to impose. The ordinance was sustained as a valid exercise of power by the city."

Also (page 370):

"If the ordinance before us is void for unreasonableness it is only because of the size of the area in which the property owner's consent is required to be obtained. Admitting that the territory is large, is it so unreasonably large as to render the ordinance void? In principle it is the same as the ordinances sustained in the cases above cited. In our opinion it does not appear, from an inspection of the ordinance itself nor from the testimony in the record, that the ordinance is such an unreasonable exercise of the power of the City Council as to be invalid. Whether an ordinance is unreasonable and void is a question of law for the court."

• In the case of *City of St. Louis v. Russell*, 116 Mo. 248, an attack was made upon the validity of an ordinance passed by the City of St. Louis affecting the location of livery stables. The particular section complained of, known as Section 734, was as follows:

"No livery, boarding or sale stables shall be located on any block of ground in St. Louis without the written consent of the owners of one-half the ground of said block."

While the Supreme Court of Missouri held that it was invalid because it delegated certain legislative power to the owners of one-half the ground in the block where the livery stable was built (which theory of the law is contrary to the

decisions of the Supreme Court of our state), nevertheless it also held (page 258) :

“The keeping of a livery stable is not a business which of itself is unlawful, but like many other trades and occupations which are carried on in large cities almost indispensable, and if it must be left to the will and caprice of those who own more than one-half the ground in every block to decide as to whether or not it shall be engaged in, it might possibly be entirely prohibited within the city limits.”

To the same effect see case of *Ex Parte Sing Lee*, 96 Cal. 354. In that case an ordinance attempted to prohibit the establishment of a public laundry, within the corporate limits of the Town of Chico, except two blocks mentioned in said ordinances, without first having obtained a written permit of the board of trustees to do so, and the written consent of a majority of the real property owners within the block in which such public laundry is proposed to be established. In this latter case it was held not only to be a delegation of legislative power but also an unreasonable restriction that amounted to a prohibition.

It is needless to cite any other authorities in support of our opinion, but it will be readily seen from a reading of the authorities in our state that an ordinance such as is contemplated requiring frontage consents for the location of a junk shop in a business street would be held unreasonable and therefore invalid.

Respectfully submitted

DAVID T. ALEXANDER,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON
Corporation Counsel.

**Locking of Motor Vehicles and Motorcycles When Left
Un guarded on Streets.**

May 31, 1916.

HON. OTTO KERNER, Chairman, Committee on Judiciary.

Dear Sir:

We are in receipt of a communication dated May 15th,

from Hon. John Siman, city clerk, transmitting a copy of a proposed ordinance requiring that motor vehicles and motorcycles left unguarded on any street, alley or public place in the City of Chicago shall be locked. He states that your committee desires an opinion as to the validity of such an ordinance.

General powers of regulation and control of motor vehicles and motorcycles inhere in the state, and by virtue of the Act of 1911, as amended, governing the use of motor vehicles and motorcycles, these powers cannot be exercised by municipalities except in so far as is permitted by said act.

A perusal of this act discloses that Section 12, as amended, entitled "Local Ordinances," contains, among other things, the following provision:

"Provided, that nothing in this act contained shall be construed as affecting the power of municipal corporations to make and enforce ordinances, rules and regulations affecting motor trucks and motor driven commercial vehicles and motor vehicles which are used within their limits for public hire; or from making and enforcing reasonable traffic and other regulations except as to rates of speed not inconsistent with the provisions hereof."

In the case of the *City of Chicago v. Shaw Livery Company*, 258 Ill. page 409, the Supreme Court sustained the validity of an ordinance prohibiting the operators of motor vehicles or motorcycles from allowing noxious smoke, gas, steam or other offensive odors to escape from same on public streets, alleys and public places in the city, on the ground that this ordinance, which the Shaw Livery Company contended was invalid, was consistent with the provisions of Section 12 of said act hereinabove referred to. In rendering this decision, the court said in substance that Section 12 of the Motor Vehicle Act of 1911, as amended, invested municipalities with the power and authority to make any regulation for the use of motor vehicles not inconsistent with the provisions of the act, except as to rates of speed.

The power of the city to make the regulations contained in this ordinance is, we believe, derived under several clauses

of the section of the Cities and Villages Act, defining the powers of cities and villages. (Hurd's Revised Statutes of 1915-16, pages 304, 309.)

Under the 9th clause of Section 1 of Article V of said Cities and Villages Act, authority is conferred upon the city to regulate the use of streets.

Clause 66 gives the city power to regulate the police of the city and pass and enforce all necessary police ordinances.

Clause 96 vests the city with authority to license and control all wagons, * * * and other vehicles.

It will be observed that, under the foregoing clauses, the power of the city with regard to the regulation of streets and vehicles is very broad.

Under the police power alone, there is no question that the city has the power to make all reasonable regulations designed to promote greater safety to the public in the operation of vehicles on the public streets.

McQuillin on Municipal Corporations, in Section 458, says:

“The protection of life and limb is a matter of public concern and there is both a power and obligation on the part of the public authorities to pass and enforce reasonable police provisions for this purpose.”

In the case of *City of Chicago v. Kluever*, 257 Ill. p. 317, the court, at page 323, said:

“The police power was defined as that inherent or plenary power which enables the state to prohibit all things hurtful to the safety and welfare of society, and it was held that such power was delegated to the city by Clause 66, subject to the condition that it should be reasonably exercised.”

In view of the foregoing, we are of the opinion that the passage, by the City Council, of an ordinance such as is under consideration herein, would be a valid exercise of the legislative power conferred upon the city by the Legislature.

We return, herewith, proposed ordinance which was referred to us by the city clerk.

Yours very truly,

JOHN A. COOKE,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTIELSON,

Corporation Counsel.

Drip Pans in Subways.

Chicago, Ill., June 1, 1916.

HON. AUGUST W. MILLER, Superintendent of Streets.

Dear Sir:

In reply to your request of May 20th, in which you ask for advice as to your power and authority to compel the Lake Shore & Michigan Southern Ry. Co., to install drip pans in the subway at 18th street between Clark street and Wentworth avenue, and the method which you should pursue to enforce the same.

We beg to reply that Section 3 of the ordinance for the elevation of tracks of the Lake Shore & Michigan Southern Ry. Co., and other railroads passed by the City Council May 17, 1897, page 214, provides as follows:

“Section 3. The said elevated tracks shall be carried across all intersecting streets, avenues and alleys, which, by the terms of this ordinance, are to be provided with subways, on suitable bridges of one, two or three spans, whose superstructure shall consist of iron or steel main girders, with iron or steel main floor, or ordinary track stringers; but should the latter method be adopted some suitable device shall be provided to prevent storm water, dirt, oil and other substances from dropping from such elevated structure upon the subways beneath. The said bridges shall be supported on abutments of concrete, stone or brick masonry, or on rows of iron or steel columns, braced together laterally and erected on and anchored to masonry foundations, constructed within the lines of the railroad right of way, and in the curb lines of the intersecting avenues or streets.”

Under the above section, if the superstructure was to be of ordinary track stringers a provision would have been made to prevent storm water, dirt, oil and other substances from dropping from such elevated structure upon the subway beneath. Section 9 of said ordinance, page 219, provides as follows:

“Section 9. All the work hereinbefore in this ordinance required to be done by said company upon or in connection with the public avenues and streets of the city shall be done and performed under the superintendence and subject to the inspection and approval of the commissioner of public works of said city. At least 10 days prior to the commencement of any part of such work, the plans and specifications therefor shall be submitted to said commissioner of public works for his examination, and if found to be in accordance with the provisions of this ordinance, in so far as this ordinance contains specific provisions and in the absence of such specific provisions if they shall be satisfactory to the commissioner of public works in regard to matters and details which by this ordinance are left to his discretion and judgment, such plans shall be approved by him; and after such approval all of the work outlined and included therein shall be constructed in strict conformity therewith.”

If the superstructure was of ordinary track stringers such plans and specifications under the above section when submitted to the commissioner of public works for his approval should have shown, either on the plans or in the specifications that some suitable device was provided to prevent storm water, dirt, oil and other substances from dropping from such elevated structure upon the subway beneath. As to this information you probably can be enlightened by seeing the plans either in the engineering department or in the office of the commissioner of public works.

If the superstructure was of other than ordinary track stringers as provided in Section 3, then the plans and specifications when submitted to the commissioner of public works for his approval should have shown that the same was of such a character of construction that when completed would

have prevented such a condition as is now complained of and before the acceptance of the work on behalf of the city.

Under Section 17 of said ordinance it is provided that the officers of the several railroad companies shall file with the mayor of the City of Chicago within 30 days from the passage and approval of the ordinance an agreement or agreements, whereby said railroad companies shall undertake to do and perform all the matters and things required of them respectively by the ordinance.

Under Section 3 one of the matters and things required to be done under the ordinance was "if the superstructure was of ordinary track stringers" then a suitable device should have been provided to prevent storm water, dirt, oil and other substance from dropping from the elevation structure upon the subway beneath; and the plans and specifications should have provided therefor, before their approval by the commissioner of public works.

We are unable to find any provisions in the ordinance at this late date which could legally compel the company to comply with the ordinance, if the same has been accepted by the city, and we are of the opinion that your department or the commissioner of public works should keep after this company until they comply with your request, as it seems by their letter to you that they are preparing to get the material and the authority to remedy the defect complained of. We are, however, of the opinion that if they do not comply with your request within a reasonable length of time, inasmuch as this defect has continued to be so for a long space of time, causing storm water, dirt and oil to drip from the bridge or elevation above, which is of a great deal of annoyance to the public who must use this thoroughfare, that the same has become a nuisance and should have the attention of the prosecuting attorney.

If you are not successful in such actions, then we believe the only effective remedy would be to have a general ordinance passed by the City Council declaring such a con-

dition of elevated structures to be a nuisance and provide a penalty for the violation thereof.

Yours very truly,

BENTON F. KLEEMAN,

Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,

Acting Corporation Counsel.

Tax Deeds on Property Sold for Special Assessments.

June 1, 1916.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

We are in receipt of your communication of recent date with reference to the policy pursued by the county clerk in issuing tax deeds on property in which the applicants have permitted property to be offered for sale and in which the City of Chicago withdrew the special assessment from collection. You state that the county clerk is taking the position that a withdrawal of a special assessment by the city in default of other bidders does not amount to either a sale or a forfeiture and you wish to be advised whether the position taken by him is warranted. The proposition involved has to do with the construction of Section 211 of the Revenue Act. This section provides as follows:

“If any purchaser of real estate sold for taxes or special assessment shall suffer the same to be forfeited to the state, *or again sold for taxes or special assessment*, before the expiration of the last day of the second annual sale thereafter, such purchaser shall not be entitled to a deed for such real property until the expiration of a like term from the date of the second sale or forfeiture, during which time the land shall be subject to redemption, upon the terms and conditions prescribed in this act; but the person redeeming shall only be required to pay, for the use of such first purchaser, the amount paid by him. The second purchaser, if any, shall be entitled to the redemption money, as provided for in the preceding section.”

From this section it is apparent that the portion "if any purchaser of real estate sold for taxes or special assessment shall suffer the same to be forfeited to the state, or again sold for taxes or special assessment, before the expiration of the last day of the second annual sale thereafter," is the governing factor. That a special assessment withdrawn from collection does not amount to a forfeiture is undoubtedly true.

As to whether or not it can be brought under the portion of said section "or again sold for taxes or special assessment" is rather uncertain and necessitates a construction of the words used. In reaching a proper construction of this section, it is necessary to take into account Section 212 of the Revenue Act, which provides as follows:

"The books and records belonging to the office of county clerk, or copies thereof, certified by said clerk, shall be deemed *prima facie* evidence to prove the sale of any land or lot for taxes or special assessments, the redemption of the same, or payment of taxes or special assessments thereon."

The word "sold" in the portion of Section 211 just quoted is the controlling factor in said section. The word "sold" has been defined as follows:

"The word 'sold' imports not a mere proposition to sell but a consummated contract of sale."

Forthman v. Deters, 206 Ill. 159.

From the definition in the *Deters* case it is quite evident that the county clerk would not be justified in holding that special assessments withdrawn from collection could be brought under the provision of Section 211 which provides "or again sold for taxes or special assessments."

Inasmuch as the word "sold" imports not a mere proposition to sell but a consummated contract of sale, and in this case the transaction lacks one of the important elements of a sale, to wit, a buyer, we are of the opinion that the county clerk is only following the provisions of Section 211

when he issues deeds to property on which there have been withdrawn special assessments.

Yours very truly,

GEORGE A. CURRAN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTTELSON,

Corporation Counsel.

**Theater at Southeast Corner of North Cicero & West End
Avenues.**

June 2, 1916.

HON. CHARLES BOSTROM, Building Commissioner.

Dear Sir:

We are in receipt of your favor of recent date advising us that an application has been filed in your department for a permit for the erection of a theater, stores and flats to be located on the southeast corner of North Cicero avenue and West End avenue, and you further advise us that West End avenue is a residential street within the meaning of that term, as applied to the issuance of licenses to theaters. We understand your question to be whether or not frontage consents will be required before a permit can be issued for the construction of the above described building.

With regard to this precise question, this department has been called upon at numerous times to draw the distinction between the issuance of the permit for the building and the granting of a license to run the entertainment after the building is completed.

The Law Department has uniformly held that so far as the location of a place of amusement is concerned, that is to say the building in which it is proposed to present the amusement, the city has no control over same. This was repeatedly held from the time that the Supreme Court gave its decision in the case of *People ex rel. Goldberg v. Busse*, 240 Ill. 338, in which it was held that the power to tax, license and regulate second-hand and junk stores did not include the power to control the location.

About two years ago the question was raised as to whether after the structure designed as a place of amusement was built and an application was made for a license the city could refuse a license under Section 117 of The Chicago Code of 1911 which prohibits the carrying on of any of the entertainments of the classes described in the code on a residential street. The matter was then thoroughly gone into and it was held that a permit must issue whenever the person who proposes to put up the building conformed to all of the requirements of the ordinances with regard to the construction of same and that the question of the issuance of the license was one that would necessarily come up later. It was decided at that time on the recommendation of the law department to stamp the permit with a note to the effect that the issuance of the building permit does not carry with it the right to a license, and we understand that this practice has been followed from that time to this. So far as the issuance of the permit is concerned, however, there is no power within the statutory grant to the city which authorizes the city authorities to refuse to issue a permit when it is properly applied for and the building requirements are lived up to.

We, therefore, recommend that you issue a permit for the building in question with the usual stamp on same.

Yours very truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Motor Trucks With One or More Trailers.

June 9, 1916.

HON. CHARLES C. HEALEY, General Superintendent of Police.
Dear Sir:

Your communication of recent date addressed to the corporation counsel, wherein you wish to be advised if it is

permissible to use motor trucks with one or more trailers attached for the delivery of goods, has been referred to me.

In reply thereto, I wish to call your attention to an ordinance regulating the speed, capacity and dimensions of motor trucks passed by the City Council under date of May 17, 1915, and appearing on pages 270 and 271 of the Printed Journal of the Council Proceedings, of which Section 8 on page 271 of said ordinance reads as follows:

“Section 8. It shall be unlawful for any motor truck to tow any other vehicle, unless such vehicle is accidentally disabled, and in such case the connection between such motor truck and such vehicle shall not exceed sixteen (16) feet in length.”

Section 8 of said ordinance plainly states that it is not permissible for motor trucks to have one or more trailers attached, and this seems to be the purpose of those who make the requests. In order that an ordinance permitting such trucks to attach one or more trailers be made effective, the above referred to section must be repealed.

You will observe that this section applies only to motor trucks. There does not appear to be any similar provision with reference to pleasure vehicles, and there is a special ordinance relating to heavy vehicles known as tractors and trailers, which permits a trailer where the front part of the combined vehicle is especially designed for the sole purpose of hauling a heavy truck. The ordinance regulating tractors and trailers will be found on pages 271 to 274 inclusive of the Council Journal of May 17, 1915.

If, after taking note of the above, you want an ordinance prepared regulating said section, we will be glad to draft the same for you.

Very truly yours,

WILBUR F. HARTMAN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Liability for Damage Caused by Fire Truck.

June 13, 1916.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.
Dear Sir:

We are in receipt of your communication of the 6th instant with attached claim and correspondence of the Lakeside Cleaners & Dyers. This claim arose from the following facts:

January 12, 1916, at 6:45 p. m. auto hose truck No. 2, from station house at 24th street and Lowe avenue, ran into the store of the Lakeside Cleaners & Dyers at 319 West 20th street, demolishing the entire front. They also state that the flying glass therefrom damaged considerable goods in the workroom, amounting to the sum of \$150.

You wish to be informed as to the city's standing in view of the foregoing facts.

A number of cases dealing with facts the same as those hereinbefore set forth have been determined in our courts. The leading authority in this state on the non-liability of the city is the case of *Wilcox v. City of Chicago*, 107 Ill. 334. The court in that case, at page 339, said in upholding the doctrine of non-liability of a municipality for negligence occasioned by a Fire Department:

"If liable for neglect in this case, the city must be held liable for every neglect of that department, and every employe connected with it, when acting within the line of duty. It would subject the city to the opinions of witnesses and jurors whether sufficient dispatch was used in reaching the fire after the alarm was given; whether the employes had used the requisite skill for its extinguishment; whether a sufficient force had been provided to secure safety; whether the city had provided proper engines and other appliances to answer the demands of the hazards of fire in the city; and many other things might be named that would form the subject of legal controversy. To permit recoveries to be had for all such and other acts would virtually render the city an insurer of every person's property within the limits of its jurisdiction. It would assuredly become too burthen-

some to be borne by the people of any large city, where loss by fire is annually counted by the hundreds of thousands, if not by the millions. When the excitement is over and calm reason assumes its sway, it may appear to many that other methods could have been adopted to stay destruction, that appear plausible as theories, and their utter fallacy can not be demonstrated by any actual test. To allow recoveries for the negligence of the Fire Department would almost certainly subject property holders to as great, if not greater, burthens than are suffered from the damages from fire. Sound public policy would forbid it, if it was not prohibited by authority."

In view of the holding in the Wilcox case and in the many cases therein cited, we are of the opinion that the City of Chicago is not legally liable for the payment of the damages sustained by the claimants, the Lakeside Cleaners & Dyers.

Yours very truly,
 GEORGE E. CHIPMAN,
Assistant Corporation Counsel.

Approved:
 SAMUEL A. ETTELSON,
Corporation Counsel.

Itinerant Vendor of Drugs.

June 13, 1916.

HON. JOHN DILL ROBERTSON, Commissioner of Health.

Dear Sir:

We have your request for an opinion, in which you ask to be advised as to the validity of Section 807 of The Chicago Code of 1911, which pertains to itinerant vendors of drugs, inasmuch as you have been unofficially informed that the state law requiring the licensing of itinerant vendors of drugs has been annulled by a decision of the Supreme Court.

In reply thereto we beg to advise you that our Supreme Court in passing upon the validity of Section 12, Chapter

91 of Hurd's Revised Statutes of 1915-16, entitled, "Itinerant vendor of medicine to obtain license," held in the case of *People v. Wilson*, 249 Ill. 195, that this section was unconstitutional so far as it applied to itinerant vendors of patent medicines and required them to pay a license of \$100 per month, the court holding that this provision, as applied to vending of patent medicines, is not a proper police measure, being of no benefit to the public health, and that the practical effect of the section, so far as patent or proprietary medicines are concerned, is to give druggists a monopoly of sale of such medicines.

The particular section of the code, in regard to which you inquire, must, however, be complied with in cases where the drugs dealt in are not proprietary medicines. In other words, a license must be obtained from the State Board of Health to permit one to vend drugs, nostrums, ointments or appliances other than patent or proprietary medicines. In the event of failure to secure such a license, an itinerant vendor may be subject to a fine of \$25 to \$200 for each offense, as is provided for by ordinance.

Yours very truly,

H. L. BRIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

City Hall Structure Under Control of Commissioner of Public Works.

June 15, 1916.

HON. JOHN SIMAN, City Clerk.

Dear Sir:

We find a letter prepared by Mr. Chipman, reading as follows:

"Replying to your letter of the 10th instant, in which you ask that, merely for the purpose of defining the respective jurisdiction of the Committee on Buildings and City Hall, and the commissioner of public works, we render an opinion, as requested by said committee, as

to what jurisdiction or control, if any, the committee has over the City Hall Building and the extent of the jurisdiction or control over the City Hall Building of the commissioner of public works, we beg to advise you that by The Chicago Code of 1911, Section 2069, among other things, it is provided as follows:

“It shall be the duty of said commissioner of public works, subject to the provisions hereof and the ordinances of the city, to take special charge and superintendence of * * * all markets and market places and all other public buildings in the city belonging to the city and of the erection of all public buildings. * * *

“This apparently gives the commissioner full control of the City Hall Building. The only limitation upon the control of the commissioner of public works appears to be contained in Section 6 of said code, which provides that:

“The mayor shall have power and authority to display flags or other decorations on, in or about the city hall or other public buildings belonging to the city, on such occasions as he may deem proper.”

“The functions of the Committee on Buildings and City Hall are not defined by the Council Rules adopted April 26, 1915, which create such committee (council proceedings of that date, page 9), further than by the general rules in reference to committees. (Rules 46 to 50, both inclusive.) It must therefore be assumed that it has those powers and functions ordinarily belonging to such a committee of a legislative body inferred from the name given to it, viz., to consider and report to the Council its recommendation upon such matters as may be referred to it by the Council. The committee of a legislative body has no executive functions, and this committee has, therefore, as such, no jurisdiction or control over the City Hall Building.”

For some reason, which we do not know, this letter was not transmitted to you in Mr. Chipman's lifetime, and we now send it to you.

Yours very truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Right of Special Policemen to Carry Arms.

June 16, 1916.

HON. CHARLES C. HEALEY, General Superintendent of Police.
Dear Sir:

We are in receipt of your letter of recent date requesting an opinion as to the right of special policemen, appointed by the superintendent of police, to carry arms on the public highways while on the wagons of the firm or individual on whose application they were sworn in.

The authority to make these appointments of special policemen is found in Section 1921 of The Chicago Code of 1911, which is as follows:

“1921. SPECIAL PATROLMEN FOR SPECIAL DUTY.) He shall have power, on the application of any person or persons showing the necessity therefor, to appoint and swear in any additional number of special patrolmen to do special duty at any fixed place within the city, at the charge and expense of the person or persons by whom the application is made, and shall keep a correct list of all persons so appointed. He shall issue a special certificate of appointment to each of said special patrolmen and shall, upon receiving a deposit sufficient to cover the cost thereof, provide them with suitable badges which shall be worn by them while on duty, and be returned to said general superintendent upon the termination of their appointment.”

Their duties and powers are defined in Section 1922, which provides:

“1922. DUTIES AND POWERS OF SPECIAL PATROLMEN.) Persons so appointed shall conform to and be subject to all rules and regulations governing the police force of the city, and to such special rules and regulations as the general superintendent may make concerning such police patrolmen. They shall possess all the powers, privileges and duties of the regular police patrolmen, at the places for which they are respectively appointed, and may be removed or discharged from service at any time by the general superintendent, without assigning any cause therefor.”

It will readily be seen that while the “persons so appointed * * * shall possess all the powers, privileges and

duties of the regular police patrolmen," these powers, privileges and duties are confined to "the places for which they are respectively appointed" and that their appointment to do special duty is confined to a "fixed place within the city." Hence, if in the course of their employment they depart from the place where they have these powers, privileges and duties, they become at once merely employes of the concerns for which they are working, without any special rights or privileges, just as they become merely private citizens without any special rights and privileges when they go home after their day's work. The plain meaning and intent of the ordinance is to limit their activities as officers of the law to the fixed places designated in the application for their appointment.

Such appointment as special patrolmen does not, on the other hand, divest them of any rights which they possess as citizens or as employes of the persons for whom they are working and when not at the place where they are acting as special patrolmen they should be treated precisely the same as any citizen who has not been sworn in as an officer.

Both the Criminal Code and the ordinances of the city prohibit the carrying of concealed weapons by any one except the peace officers especially excepted, and these are only exempt from the provisions of these laws while engaged in their official duties. It follows, therefore, that when a special patrolman is away from the fixed place at which he has the powers and privileges of an officer of the law, he is bound to observe the law with reference to carrying concealed weapons just as all other persons are bound to respect it.

Very truly yours,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Control of Buildings Being Erected in Annexed Territory.

June 17, 1916.

TO THE HONORABLE, THE CITY COUNCIL OF THE CITY OF
CHICAGO:

Gentlemen:

On June 2, 1916, the following order was passed by your Honorable Body (page 520 of the Journal of the Proceedings of said meeting):

“ORDERED, That the Corporation Counsel be and he is hereby directed to advise this Council at as early a date as possible whether the building ordinances of the Old Town of Clearing and of other annexed towns govern the erection of buildings in such territories in cases where the said ordinances are in conflict with the provisions of the building ordinances of the City of Chicago, and, further, to advise this Council, in the event the building ordinances of annexed towns are governing, how the City Council should proceed to annul such ordinances to the end that the ordinances of the City of Chicago may govern in all territory within the City of Chicago.”

Concerning this matter, we beg to advise you as follows:

In the Annexation Act of 1889 (Hurd's Revised Statutes of 1915-16, pp. 365-372), providing for the annexation of cities, incorporated towns and villages or parts of same to cities, incorporated towns and villages, no reference is made as to the effect of such annexation upon the ordinances applicable to the city, town or village annexed at the time of annexation, excepting that in Section 18 of said act it is expressly provided that the ordinances which had theretofore been in force in the annexed territory relative to licensing dramshops shall, notwithstanding such annexation, continue in force in the annexed territory.

In the case of *McGurn v. The Board of Education of the City of Chicago*, 133 Ill. 122, the court on page 131, said:

“The annexation of territory to a municipality does not carry with it the necessity of formulating a code of municipal law for the government of the territory annexed. By becoming a part of the municipality, it is *ipso*

facto brought under and made subject to all the laws by which the municipality itself is governed. Those laws extend over and apply to it *ex proprio vigore*, and do not require express legislative action to give them such application. Here, the instant the territory in question became annexed to Chicago, it became a constituent part of the city, and from that instant became subject to the same laws, the same municipal organization and the same policy which the statutes in force had already provided for the government of the city and its institutions."

Likewise, our Supreme Court in the case of *The People ex rel. City of Chicago v. The Chicago Telephone Company*, 220 Ill. page 238, at page 249, said:

"The ordinances of the city extended over the annexed territory immediately upon annexation (*Illinois Central Railroad Co. v. City of Chicago*, 176 U. S. 646), and the limitations of the ordinance applied to the annexed territory. The question in this case is the same as the one involved in the case of *Indiana Railway Co. v. Hoffman*, 160 Ind. 601 (69 N. E. Rep. 399), where it was held that a provision for transfers applied to the territory annexed to the city after the contract was made, and on an interurban line on which the defendant had been entitled to charge an additional fare before the annexation of the territory."

We beg to advise you that our opinion, predicated upon the foregoing judicial decisions, is that the building ordinances of the Old Town of Clearing and of other towns annexed to the City of Chicago under and by virtue of the Annexation Act of 1889, were by such annexation *ipso facto* nullified, and that the building ordinances of the City of Chicago govern the erection of buildings in such annexed territory.

Respectfully submitted,

JOHN A. COOKE,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Employment of Assistant Inspectors of Moral Conditions.

June 19, 1916.

HON. CHARLES C. HEALEY, General Superintendent of Police.
Dear Sir:

In response to your verbal request for an opinion as to your right to appoint assistant inspectors of moral conditions which are authorized by an appropriation for that purpose, we submit the following:

We understand that the question has arisen by reason of the wording of certain provisions of the appropriation ordinance of 1916, which read as follows:

“Inspection of moral conditions and all complaints, services of assistant inspectors as needed, pay not to exceed \$5.00 per day and expenses. (This fund and the foregoing employees, to be under the control and supervision and selection of the second deputy superintendent of police) . . \$24,000.00

“Inspection of moral condition and all complaints. (This fund to be under the control and supervision of the second deputy superintendent of police) 12,000.00”

It is contended that by reason of the above appropriations the appointment of temporary assistant inspectors of moral conditions and the handling of the fund so appropriated is taken from the head of the department and placed into the hands of the second deputy superintendent of police, although the appointment of the regular inspector of moral conditions is retained by the general superintendent, and the direction of the official conduct of both the second deputy superintendent and the morals inspector is by law vested in him. If that were really the intention of the City Council the language employed falls far short of expressing same, and if language had been employed that would leave no doubt as to such intention of the City Council it would have to give way to valid enactments of the City Council which are in force and which can not be overridden in such a way.

While it is clear that it was the purpose to use this fund in such a manner that the direction of the work should come under the second deputy superintendent of police and that he should have a large measure of discretion in the expenditure of same and in the disposition of the men who are to be employed under him, it by no means follows that it was the intention to include the power of appointment even if that could be lawfully transferred through the means of an appropriation ordinance. To do that in any ordinance would require an express repeal of ordinances in conflict therewith or such precise and positive language that the conflicting ordinances must be held to be repealed by implication. The power to do this is vested in the City Council, but it must be exercised in some other manner than through the medium of an appropriation ordinance.

The function of the annual appropriation bill is to provide the fund with which to carry on the particular work contemplated in each instance where an amount is appropriated. It has been held repeatedly in cases involving contracts that the appropriation ordinance cannot do away with the provisions of other ordinances governing the letting of such contracts, and in cases involving employment that offices cannot be created thereby and that the duties, rights and obligations of officers and employes cannot be prescribed or altered by the provisions of an appropriation ordinance. Public policy does not permit the use of an appropriation bill for any other purpose than to set apart the funds for the use of the public's officers. Any other use of the power to appropriate for the needs of the public has been looked upon as obnoxious to free government for the last 250 years, from the time when the practice of tacking bills of attainder to appropriation bills brought England again and again to the brink of revolution. Hence, in so far as an appropriation ordinance attempts to override the general ordinances of the city it must be held to be ineffective.

Section 1908 of The Chicago Code of 1911, as amended at the time the police reorganization ordinance was passed, contains the following:

“The general superintendent of police shall appoint according to law all the officers and members of said de-

partment, and shall have the power to remove from the Police Department and the service of the City of Chicago any member thereof in the manner provided by law."

Section 1910 of the same ordinance places "the management and control of all matters relating to the Department of Police, its officers and members" in the general superintendent of police. The same section provides that he "shall have the custody and control of the offices, stations, equipment, books, records and other property belonging to said department," and makes it the duty of the general superintendent of police to preserve the peace and secure good order and cleanliness within the city. The appointment of assistant inspectors of moral conditions and the proper expenditure of the fund provided for that purpose is a part of the management of the Department of Police, and a part of the duties of the general superintendent of police. The general superintendent is the responsible head of the department, and the ordinances of the city would be searched in vain to find any division of responsibility for the conduct of the department. It cannot be said that the general superintendent is relieved of responsibility for moral conditions by the wording of the appropriations above referred to, and he must therefore be assumed to be responsible for the proper use of the money appropriated. To hold that he was thus responsible for the proper expenditure of the money without at the same time leaving in his hands the power to employ the men who will spend it would be to create an anomalous situation fraught with injustice.

Aside from all this, the construction which we have been pointing out as invalid is so utterly at variance and inconsistent with other parts of the appropriation ordinance itself that it cannot be countenanced.

Section 3 of the appropriation ordinance provides that the heads of the departments shall administer the amounts appropriated in the same, and Section 7 requires that, unless otherwise provided by statute or ordinance, offices and places shall be filled by appointment by the head of the department

to which the particular office or place to be filled belongs "in accordance with the provisions of the city's Civil Service Act." The Civil Service Act in turn provides that the head of a department may, with the approval of the Commission, make temporary appointments to remain in force not exceeding sixty days and only until regular appointments under the provisions of said act can be made.

While the provisions for appointment may have been intended to apply to regular employees, it must be held to relate to all. From the information at hand it seems that these assistant moral inspectors cannot be appointed for any great length of time so as to be of any service to the city; their usefulness ends as soon as they become known. Therefore it would be futile to appoint them through the regular means of examination and an eligible list. The City Council evidently recognized this in making the appropriation, since it did not provide for a regular salary, but only for a *per diem*.

Therefore, the provision in the Civil Service Act relating to sixty day appointments applies in this case, and the appointment is within the control of the general superintendent of police.

It will thus be seen that to construe the qualifying provisions of the appropriation ordinance quoted above one way, would render them unlawful and possibly even invalidate the appropriations, while to construe the qualifying clauses as we have indicated, would keep them within the law. A well recognized canon of construction holds that where two interpretations may be given to a provision in a legislative act, one of which renders it lawful and the other unlawful, that interpretation must be placed upon it which will be lawful, so as to give the enactment its due effect. Applying this rule of construction to the words taken from the appropriation bill quoted above, there remains no doubt as to the proper interpretation to be placed on them. The general superintendent of police retains the power of appointment so far as these assistant moral inspectors are concerned, al-

though they come under the immediate supervision and control of the second deputy superintendent of police.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Ordinance Exempting Existing Theaters From Certain Provisions of Code.

June 19, 1916.

HON. JOHN KJELLANDER, Chairman, Sub-Committee on Judiciary.

Dear Sir:

Pursuant to the inquiry of your sub-committee which is considering the amendment to Section 117 of The Chicago Code, for an opinion as to the legality of an ordinance exempting theaters erected prior to the passage of paragraph A of Section 117 of The Chicago Code of 1911, from the operation of its restrictive provisions, we beg to advise you as follows:

This matter has been given our very close and careful consideration, but a most diligent search fails to reveal a case similar to this on which we can rely as an authority, and we are therefore compelled to render an opinion based upon general principles of law applicable to the question involved. There are certain well established laws of statutory and ordinance construction so universally recognized as being the law, that it needs no citation of authorities to support them.

It is conceded as well established law, that where power is conferred upon a municipal corporation to enact ordinances for the better government of its inhabitants, it can not, in the exercise of that power, enact ordinances that are unreasonable, oppressive, or such as will create a monopoly, and as it would be unreasonable and unjust to make under the

same circumstances an act done by one person penal, and if done by another not so, ordinances which have this effect cannot be sustained. Special and unwarranted discrimination, or unjust or oppressive interference in particular cases, is not to be allowed.

The powers vested in municipal corporations, as far as practical, should be exercised by ordinances general in their nature and impartial in their operation. Dillon on Mun. Corp., Section 593.

It needs no argument, of course, to show that while constitutional provisions prohibit arbitrary discriminations in favor of or against selected individuals or groups, it is within the legislative power to classify subjects of regulation, and to pass laws applicable to all of a class * * *, provided that the classification so made be founded upon some reasonable intrinsic basis of differentiation.

All discriminations in ordinances against some of a same class are bad. The regulation must apply to all of a class. Laws relating to persons and things as a class and not to persons or things of a class are common and usually sustained. The law will be held valid if its provisions apply equally to all subjects within the class for which the rule is applied.

“Where all persons engaged in the same business (as laundry) within the prescribed limits are treated alike and subject to the same restrictions, the ordinance will be sustained. The rule is thus stated by the Supreme Court of the United States, per Mr. Justice Field: ‘The specific regulation for one kind of business, which may be necessary for the protection of the public, can never be a just ground of complaint because like restrictions are not imposed upon other business of a different kind. The discriminations which are open to objection are those where persons engaged in the same business are subject to different restrictions, or are held entitled to different privileges under the same conditions. It is only then that the discrimination can be said to impair that equal right which all can claim in the enforcement of the laws.’ ”

McQuillin Mun. Corp., Section 738.

The general propositions of law above referred to may invalidate the legality of an ordinance which attempts to legislate against certain amusements or theaters licensed and recognized by the municipality as a lawful business after the enactment of Section 117 of The Chicago Code of 1911, as it may be argued with force that it is an attempt to discriminate against persons and things of a class and not against persons and things as a class. Of course, it may be argued that the ordinance is not directed against the building itself but against the carrying on or conducting of the amusement or exhibition which requires a yearly license therefor, and that it is a well recognized legal principle that there can be no vested property right in a license and that therefore the person or persons affected can not be heard to complain; yet it may also be argued with equal force that a person seeking to operate a theater in a building which has already been used and is now being used for that purpose, it may be held that when a theater is once legally established in a building, the character of the building for all purposes of future occupancy is stamped and permanently fixed until there is a change in the character of the occupation. It may be that, to attempt to deprive the owner of a theater building, recognized and licensed as such, from its future operation as a theater, might be a deprivation of his property rights and might be construed as taking private property without just compensation. Only in extreme cases where the health, safety and comfort of the public is involved or endangered would this extraordinary exercise of the police powers be upheld.

In the case of *Tugman v. City of Chicago*, 78 Ill. 405, the Supreme Court passed upon the validity of an ordinance which read as follows:

“That from and after the first day of January, A. D. 1872, no distillery, slaughter house, rendering establishment or soap factory shall be erected or put into operation in any building not now used for such purpose, within the territory in the City of Chicago bounded as follows, to wit: Fullerton avenue on the north, Thirty-fifth street on the south, Lake Michigan on the east, and Western avenue on the west.”

The court there held:

"If the board of health had any power to adopt an ordinance on the subject, the ordinance, to be valid, should not discriminate in favor of any citizen. If it prohibited one from carrying on the business, that prohibition should extend to all, regardless of the time the business may have been commenced."

To the same effect see:

Lake View v. Tate, 130 Ill. 247.

Chicago v. Rumpff, 45 Ill. 90.

State v. Hinman, 65 N. H. 103.

State v. Pennoyer, 65 N. Y. 103.

Dill, Mun. Corp., Section 322.

State v. Manner, 43 La. Ann. 495.

In re Ex Parte Bohen, 115 Cal. 372.

Los Angeles v. Hollywood Gem. Ass'n., 124 Cal. 344.

In re Condero, 19 Cal. App. 66.

The section which it is proposed to amend, namely, Section 117 of The Chicago Code of 1911, is as follows:

"117. FRONTAGE CONSENTS AND OTHER PROHIBITIONS.) It shall hereafter be unlawful for any person, firm or corporation to produce, offer, present or carry on any of the entertainments of any of the foregoing classes, excepting entertainments of the 7th Class and 10th Class and entertainments given within the grounds occupied by said 7th Class or 10th Class, on any street in any block in which two-thirds of the buildings on both sides of the street are used exclusively for residence purposes, without the written consent of a majority of the property owners according to frontage on both sides of such street in such block; *provided, however*, that nothing herein contained shall apply to the foregoing classes of entertainments produced, offered or presented prior to the first day of January, A. D. 1910.

"It shall hereafter be unlawful for any person, firm or corporation to produce, offer, present or carry on entertainments of the 7th Class or 10th Class, as hereinbefore defined, in any block or square in which two-thirds of the buildings on both sides of the street or streets around such block or square are used exclusively for residence purposes, without the written consent of the owners of a majority of the frontage on both sides of the street or streets on each side of the block or square in which it is desired to produce, offer, present or carry

on the aforesaid class of entertainments, together with the written consent to the production, offer or carrying on of such entertainment of a majority of the *bona fide* householders living within one thousand feet from the nearest point in any boundary of the place within which it is proposed to produce, offer, present or carry on such entertainment; *provided, however*, that nothing herein contained shall apply to the foregoing classes of entertainment given within any place used for such purpose prior to the first day of January, A. D. 1910.

“Such frontage and householders’ consents shall be obtained and filed with the department of buildings before a license shall issue for such entertainments; *provided, however*, that

“(a) None of the foregoing twenty-one classes of entertainments shall be produced, offered, presented or carried on within two hundred feet of any hospital, church or building used exclusively for educational purposes; said distance to be measured between the nearest point in any boundary line or the place within which it is proposed to produce, offer, present or carry on such entertainment, and the boundary line of the lot on which such hospital, church or building used exclusively for educational purposes is located.

“(b) In addition to the foregoing restrictions no license shall be issued for the production of any entertainment of the 13th class in any building, enclosure or place any part of which is situated within fifteen hundred feet of the boundary line of any public park, wholly or in part in the city.”

Paragraph A of said ordinance does not limit the restriction to entertainments carried on subsequent to the date of its passage, but it is general in its terms, and therefore must necessarily apply to any and all classes of entertainments mentioned in Section 116 produced, conducted or carried on within two hundred (200) feet of any church, school, or building used exclusively for educational purposes, whether the building was erected prior or subsequent to the passage of Section 117.

In construing ordinances, the same rule applies as in the construction of statutes, and in the construction of statutes the intention of the legislative body is to be ascertained and

given effect if possible, and that intention is to be gathered from the necessity or reason of the enactment and the meaning of the words enlarged or restricted according to their real intent.

Hoyne v. Danisch, 264 Ill. 483.

People v. Fox, 269 Ill. 300.

Applying this proposition of law to the ordinance in question, can it be said that the only construction to be placed upon the restriction contained in Paragraph A is that it was intended to affect and apply to only such amusements and entertainments given or produced within 200 feet of the church, etc., where the building therefor was erected prior to the passage of this ordinance? We think not. Carrying out the logic in the Tugman case, *supra*, and other cases cited, it is our opinion that an ordinance passed at this time which would exempt from the operation of the restriction contained in Paragraph A, such theaters as were erected prior to the passage of the ordinance, and at the same time attempting to enforce the restriction and prohibition on those erected since the passage of that ordinance, would be considered highly discriminative, and therefore void.

The next question which your honorable body has asked us to consider is whether or not an ordinance could be now passed, so worded as to hereafter restrict the carrying on of any amusements or entertainments within a given distance of church, school or building used exclusively for educational purposes, and in that way raise the ban as to the producing and carrying on of amusements in buildings erected therefor prior to the passage of this proposed ordinance.

There are no decisions directly in point in the State of Illinois to guide us, but we find a somewhat similar situation in the case of *In Re Ex Parte Stollenberg*, 134 Pac. Rep. 971. In that case the validity of the following ordinance was attacked:

“No building hereafter constructed as or altered into a tenement house, shall be occupied in whole or in part for human habitation until the issuance of a certificate by the Health Department * * * that said building conforms in all respects to the requirements of this act,

relative to the light, ventilation and sanitation of the tenement houses hereafter erected.”

It was there contended that this ordinance made an unjustifiable discrimination between buildings erected as or altered into tenement houses after the enactment of the law, and buildings occupied as tenement houses theretofore. The opinion in this case is very elaborate, and the court in its opinion held such an ordinance valid and a proper exercise of the police powers. To the same effect is the case of *Signell v. Wallace*, decided by Supreme Court of New York and reported in 72 New York Supp., page 348.

Respecting amusements and exhibitions, etc., the authority of the corporation under the power to license has been regarded as greater than when the same word is employed as to trades and occupations.

Dillon on Mun. Corp., Section 661.

Bennet v. People, 30 Ill. 389.

East St. Louis v. Wehrung, 46 Ill. 392.

Recognizing this power, the Legislature authorized municipalities to “license, tax, regulate, suppress and prohibit hawkers * * * theatricals and other exhibitions, shows and amusements, and to revoke such license at pleasure.” Our Supreme Court held that where the Legislature confers upon a city power to regulate, license and prohibit, the City Council may impose such restrictions and conditions as it sees fit, subject to the limitations only which the constitution passes on its acts.

Schwuchow v. City of Chicago, 68 Ill. 444.

Launder v. City of Chicago, 111 Ill. 291.

Goodrich v. Busse, 247 Ill. 366.

Under this grant of power, it is a matter purely discretionary with the city authorities whether they will license and regulate the business, or wholly prohibit and suppress such business within the city. In such cases, if the city grants a license, it may impose conditions and burdens as it may see fit. This latitude of power grows out of the fact that it is discretionary to prohibit the business, or license it on such terms as the city may choose.

Launder v. City of Chicago, 111 Ill. 291, and cases cited above.

The ordinances of a city to prohibit book-making and pool-selling within the corporate limits which contained the following provision:

“provided, however, that the provisions of this ordinance shall not apply to the actual enclosure of fair or race-track associations that are incorporated under the laws of the state, during the actual time of the meetings,” was held to be valid in the case of *City of Chicago v. Brownell*, 146 Ill., page 64. In its opinion the court said, on page 70:

“But again, if it were admitted that the ordinance, by implication, sanctions book-making, etc., within ‘the actual enclosures of fair or race-track associations that are incorporated under the laws of the state,’ etc., it does not appear that defendant in error, or any one else, is discriminated against. If any one can lawfully engage in that business in those places at such times, for anything appearing in this ordinance, defendant in error and all other persons so disposed can do the same. On the principle that a city council may discriminate between different localities within the city limits in granting license to sell intoxicating liquors, ‘making no distinction between persons, but between places, only,’ as was held in *City of East St. Louis v. Wehrung*, 46 Ill. 393, this ordinance would be valid in any view which can be taken of it.”

Under Clause 46 of the Cities and Villages Act, giving the city power to license, regulate and prohibit the selling of liquor, it is held, it can prohibit liquor selling in certain places.

Harrison v. People, 222 Ill. 150.

Swift v. People, 162 Ill. 537.

People v. Cregier, 138 Ill. 401.

Straus v. Galesburg, 203 Ill. 234.

From the foregoing authorities, we are of the opinion, first, that the City of Chicago could not at this time, in view of the wording of Section 117 of The Chicago Code of 1911, pass a valid ordinance, exempting certain theatres erected prior to 1910, and at the same time seeking to enforce the

prohibition contained in the above section against theatres erected since 1910, the date of the passage of ordinance in question. Second, that the City Council has the right at this time to pass a valid ordinance making it unlawful for anyone to carry on, produce or give any amusements hereafter within a given distance of any church, school, hospital or building used exclusively for educational purposes; and it is our opinion that such an ordinance would be upheld as a valid exercise of the police powers delegated to municipalities under Clause 41 of Article 5 of the Cities and Villages Act.

Very respectfully,

DAVID T. ALEXANDER,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

**Responsibility and Control of the City Treasurer and City
Comptroller Over Moneys Paid to Departments for
Petty Cash Funds.**

June 20, 1916.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

Your communication of the 14th inst. addressed to the corporation counsel requesting an opinion in the above matter was referred to the undersigned for attention.

You enclose with your letter a communication to your committee from the city treasurer in which he states that these petty cash funds are being held in the various departments contrary to law.

The Cities and Villages Act (Section 62, Clause 1) provides that the City Council shall have the following power:

“To control the finances and property of the corporation.”

Section 92 of the same act, in the words and figures following, prescribed the duties of the city treasurer:

“The treasurer shall receive all moneys belonging to the corporation, and shall keep his books and accounts in such manner as may be prescribed by ordinance, and such books and accounts shall always be subject to the inspection of any member of the City Council or Board of Trustees.”

Section 104 of this act prescribes the powers and duties of the city comptroller and is as follows:

“104. HIS POWERS AND DUTIES.) §17. The city comptroller (if there shall be any city comptroller appointed, if not, then the clerk) shall exercise a general supervision over all the officers of the corporation charged in any manner with the receipt, collection or disbursement of corporate revenues, and the collection and return of all such revenues into the treasury. He shall have the charge, custody and control of all deeds, leases, warrants, vouchers, books and papers of any kind, the custody and control of which is not herein given to any other officers; and he shall, on or before the fifteenth day of May, in each year, and before the annual appropriations to be made by the city council or the board of trustees, submit to the city council or board of trustees a report of his estimates, as nearly as may be, of moneys necessary to defray the expenses of the corporation during the current fiscal year. He shall, in said report, class the different objects and branches of expenditures, giving, as nearly as may be, the amount required for each; and for the purpose of making such report, he is authorized to require of all officers their statement of the condition and expenses of their respective offices or departments, with any proposed improvements and the probable expense thereof, all contracts made and unfinished, and the amount of any and all unexpended appropriations of the preceding year. He shall, in such report, show the aggregate income of the preceding fiscal year, from all sources, the amount of liabilities outstanding upon which interest is to be paid, the bonds and debts payable during the year, when due and when payable; and in such report he shall give such other information to the council or board of trustees as he may deem necessary, to the end that the city council or board of trustees may fully understand the money exigencies and demands upon the corporation for the current year.”

We desire to call your attention to the section prescribing the duties of the city treasurer, in that it provides that the city treasurer shall *receive* all moneys * * *, while in his letter to your committee he states that the act provides that the city treasurer shall keep all moneys * * *. The statute further requires that the money of the city is to be deposited in the city depositaries and when once deposited the responsibility for its safety in the depositary does not lie with the city treasurer. It cannot be withdrawn except on a check or draft accompanied with a warrant drawn in accordance with Section 98 of the same act. There is, however, nothing in the statutes which prohibits the City Council from directing that a sum be withdrawn for a specified purpose, such as may be required by the head of a department for immediate needs. It would be hampering the work of the city's officers to construe the various provisions of the statute in such a way as to prohibit the drawing of money otherwise than in the form of a check or draft drawn to the order of the party who actually gets the money ultimately.

We are, therefore, of the opinion that so far as the legal aspect of the matter is concerned, there is nothing unlawful in the method heretofore pursued. As to the question of policy, that is something which we are not called upon to decide.

We conferred with the secretary of your committee relative to this question and were advised by him that appropriations were duly made authorizing the withdrawal of these various funds to be held in the departments as petty cash funds. In view of the fact that Section 62 vests in the City Council control of the finances of the city and the sections of the statute prescribing the duties of the comptroller and treasurer do not prohibit such a practice, we believe the Council was acting within the scope of its authority in permitting this to be done.

We return herewith your letter and draft of ordinance.

Very truly yours,

WM. H. DEVENISH,

Approved: *Assistant Corporation Counsel.*

SAMUEL A. ETTELSON,

Corporation Counsel.

Proceedings for Widening 12th Street.

June 23, 1916.

HON. M. J. FAHERTY, President, Board of Local Improvements.

Dear Sir:

We are in receipt of your letter of recent date, in which you state that in the matter of widening 12th street it is the intention to secure the necessary money for proceeding with the improvement by means of a pledge of the proceeds of the special assessment about to be levied in accordance with the provisions of the amended act concerning municipal funds. You state that the total amount of the assessment for this purpose is to be \$3,290,000, of which about half is for public benefits; also, that you are anxious to proceed at once with the improvements, and you ask whether or not you can legally borrow the necessary money pending an appeal in case the city elects to proceed, and how much you can borrow in accordance with the provisions of the act.

The act in question was approved December 3, 1915, and does not become effective until July 1, 1916. There is, however, nothing to prevent taking such preliminary action as may be deemed necessary in the way of making appropriations to be paid for out of money ultimately borrowed this way. Whatever action the Finance Committee may take in the matter should be in contemplation of the act going into effect after July 1.

We know of no reason to prevent the borrowing of money immediately after the assessment roll has been certified to the city collector. We understand from counsel representing the city in the court proceeding that such an assessment roll will be filed with the city collector within the next few weeks, in conformity with the provisions of Section 62 of the Act concerning local improvements. So far as the parties who have appealed are concerned, the assessment roll cannot be filed as to them until their appeals are disposed of. When the assessment roll is filed there is a legal warrant for collecting

the assessment against those property owners who are named therein and also a legal assessment against the city for public benefits. The City Council may then, under the provisions of the new act, loan money to the Board of Local Improvements to the extent of not more than 50 per cent of the total amount of the special assessment provided for in said assessment roll, including the amount assessed against the city. It will be necessary to pledge, in writing, the entire extent of such special assessment for the repayment of such advance out of the proceeds of same.

While it is likely that there will be a large number of appeals, it is not probable that the right of the city to make the improvement, or the validity of the ordinance under which it is to be made, will be successfully attacked, and in any event, if that should be the case, under the amendment of the Local Improvement Act passed in 1913, it would be possible to correct any error that has been made by a new ordinance or other proceedings in lieu of those now pending.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

**Confinement of Enlisted Men Charged With Desertion in the
Police Station Pending Court Martial.**

June 24, 1916.

HONORABLE C. C. HEALEY, General Superintendent of Police,
Chicago, Illinois.

Dear Sir:

You have asked for an opinion concerning the right of the officers in charge of a police station to keep in custody an officer or enlisted man who is a member of the State

Militia, and who has been arrested and is awaiting Court Martial.

We are advised by the military authorities of this city that they have at the present time no place within the control of the military officers where such person can be kept until the time of his trial, before either a General Court Martial or Summary Court Martial, as the case may be.

Under the act to establish a military and naval code for the State of Illinois, express provision is made for the confinement of a prisoner who has been found guilty, after due trial by a Court Martial, on a warrant of commitment, in either the County Jail or a penitentiary. There is no express provision, however, authorizing the civil authorities to act pending the hearing before the Court Martial; and whatever process is served, and whatever action may be taken thereon, must be construed as in pursuance of the military authority vested in the officer who orders the arrest.

Under Section 10 of Article XX of the said statute, any officer or enlisted man who wilfully fails or refuses to report with his organization, or quits the same without due authority, when the same shall be called into the active service of the State of Illinois, in time of public disorder or danger, can be regarded as guilty of desertion and may be punished as a Court Martial shall direct.

The question therefore has arisen whether you are justified in holding in custody at the direction of the proper military officer such a party, without express authority of the statute.

According to the American and English Encyclopedia of Law, Second Edition, Volume 20, page 654, officers charged with crime are required to be arrested and confined in their barracks, quarters, or tents, and deprived of their swords, by the commanding officer, in all cases of infractions of the military law; but, soldiers charged with crimes are required to be confined until tried by Court Martial, or released by proper authority. No warrant is required for the arrest of such a soldier, nor is the manner or place of confinement specified. A deserter may be arrested by the proper authority, without a warrant, and confined in any place

that is convenient for the purpose, if the officer ordering the arrest requires it.

This has been expressly held in the case of *Hutchins v. Van Bokkelen*, 34 Maine 126, in which the court used the following language:

“The provisions of the constitution of this state and of the United States, cited in argument, do not forbid the arrest of deserters from the army without warrants, nor were they intended to prevent the enactment of suitable and proper laws for its government.

“No warrant is required for their arrest, nor is the manner of confinement specified. The plaintiff having deserted was subject to confinement until he should be tried, and it was the duty of the defendant to cause him to be safely kept. There was no violation of law in confining him in the County Jail. The jailor was under no obligations to receive him, but his consent to do so, furnishes no just ground of objection on the part of the plaintiff. Nor is it apparent that the place of confinement was improper, nor that the defendant departed from the line of his duty. There was probably no other convenient mode by which he could securely keep the plaintiff.”

The circumstances in the present instance, according to the information at hand, are precisely as in the case above quoted. While the prisoner thus arrested is in the custody of the police, he is, in contemplation of law, the prisoner of the military authorities, and not the civil authorities, and the former are responsible for his detention. No liability can attach to the civil officer who, in response to an order of the proper military authorities, keeps the prisoner safely until such time as he is tried by Court Martial, or is otherwise duly discharged by process of law.

It is important in every case that the police officer who detains a person thus arrested should have authority in writing from the military officer who orders the detention of such person, inasmuch as the police officer is not, under such circumstances, acting in the capacity of an officer of the city, but as the agent of the military authorities for this purpose.

Inasmuch as the statute expressly recognizes the County

Jail as a proper place of confinement after trial and a warrant of commitment is issued, it follows that it would be advisable to send all such prisoners to the County Jail as soon as practicable after the arrest.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Liquidated Damages on Contract for Plumbing at Municipal Pier.

June 27, 1916.

HARBOR & SUBWAY COMMISSION, Chicago, Illinois.

Gentlemen:

We have your letter of June 23rd, supplemental to your letter of June 1st, requesting an opinion as to whether or not G. Albin Nilson should be required to pay liquidated damages for failure to complete his contract within the time limited therein.

We have examined the contract and the history of the work as set out in your two communications above referred to and find:

That the contract was dated October 7, 1914 and provides for the completion of the work on May 1, 1915.

That on October 26, 1914, the commission changed the plan of the work and thereby caused a delay of 19 days to the contractor.

That the failure of the building contractors to complete their work caused a further delay of 195 working days to the contractor.

That the contract was practically completed on December 21, 1915, 233 days after the date fixed in the contract.

The contract provides that Sundays, holidays and delays caused by the commission should not be chargeable to the contractor, and under the foregoing clause the contractor

would be entitled to credit for Sundays and holidays amounting to 38 days within the period between May 1, 1915, and December 21, 1915, and to a further credit of 19 days for the delay caused by the change of plans: This makes a total of 57 days. Deducting this credit of 57 days from 233 days the total number of days delay represented in the completion of the work, leaves 176 days. But it appears that 195 days delay was caused by the failure of other contractors to complete their work, so as to permit of Nilson's proceeding with the work under his contract.

The law is that contractors are the agents of the owner in the matter of furnishing the site for the work to other independent contractors.

In the case of *Michigan Avenue M. E. Church v. Hearson*, 41 Ill. App. 92, the court held that the owner of a building was responsible in damages to a contractor who was delayed beyond a reasonable time by the failure of other contractors to complete their work. The court says:

"It is shown by the evidence that appellees were greatly delayed in the performance of their work by the failure and dilatoriness of other contractors. The stone work was not done on time, nor the plastering, and on the whole, appellees were some eight months longer on the job than they should have been. There was an advance in the cost of materials and of labor, before they could do the work, which would not have affected appellees if they had been permitted to proceed with their work with reasonable diligence. While no time is fixed by the contract within which the carpenter work is to be finished, it is implied that it shall be done within a reasonable time and that appellant will so arrange with reference to the other work on the building that appellees may complete it within such reasonable time. (*Taylor v. Renn*, 79 Ill. 182; *Toby v. Price*, 75 Ill. 645; *Nelson v. Pickwick Ass. Co.*, 30 Ill. App. 333, and cases there cited.)"

In the case of *Strobel Steel Construction Co. v. Sanitary District of Chicago*, 160 Ill. App. 559, the court says:

"We are of the opinion further that the delay of the defendant in locating to the plaintiff the site cleared of all obstructions, for the erection of the dam, and the

fact that defendant permitted the plaintiff to proceed with the work after the time fixed for its completion and accepted the work, tends to show that the time limit was either waived altogether, thus giving the plaintiff a reasonable time to complete the contract, or, that defendant extended the contract time of completion by a period equal to the delay caused by the defendant either in failing to deliver the site or in obstructing the work of the plaintiff after the work had been commenced, and that the defendant thereby waived any and all right to the liquidated damages provided for in the contract for delay on the part of the plaintiff. (*Taylor v. Renn*, 79 Ill. 181; *Paddock v. Stout*, 121 *id.* 571; *Bloomington Hotel Co. v. Gartkwait*, 227 *id.* 613; *Nibbe v. Brauhn*, 24 *id.* 268; *City of Chicago v. Duffy*, 117 Ill. App. 261; *Smith v. Sanitary District of Chicago*, 108 *id.* 69; *Eyster v. Parrott*, 83 Ill. 517.)''

Under the rule laid down by the foregoing authorities, Nilson would be entitled to a further credit of time to the extent of 195 days, which would wipe out all of the remaining time upon which the city might base a claim for damages under the liquidated damage clause in the contract.

Our conclusion is that under the law and the facts in the matter under consideration the city cannot lawfully claim damages for failure upon the part of G. Albin Nilson, the contractor, to complete the work within the time specified in the contract; and final estimate should be paid upon approval of the same by the Harbor & Subway Commission.

We return herewith original contract received from you for reference and examination.

Very truly yours,

EDWARD H. WRIGHT,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

**Removal of Water Main From Land Not Contained in
Contract of Easement.**

June 27, 1916.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.
Dear Sir:

We have your communication of the 20th instant, transmitting copy of resolution introduced at a meeting of the City Council by Alderman Anderson, together with copy of contract of easement between Lucius B. Otis and the City of Chicago under date of December 13, 1897, etc., asking for an opinion upon the legal questions involved.

According to Alderman Anderson's resolution the only question calling for a legal interpretation is "as to the right and title of the City of Chicago to maintain said water main." We have examined the copy of the original contract of easement, together with the other data submitted, and find that the city was granted the right to use a 20-foot strip of certain land to lay one large 36-inch water main; and all water supply pipes which were to be thereafter laid and the main sewer, were to be north of said 36-inch water main; that the water main was laid 5 feet north of said strip designated in the contract of easement. It does not appear whether or not water supply pipes or main sewer were laid under the privileges granted to the city.

As to the right of the city to maintain said water main upon the premises it now occupies, there can be no question that the city is a trespasser and may be required on application of the owner of the land to remove its water main. But unless such demand for removal were made by the owner, the city would not incur any greater liability for damages to adjoining property growing out of the bursting of the water main than it would incur if the water main were moved upon the strip granted for that purpose, because even though the main were laid in and upon the land for which the easement was granted, the city would still be liable for the damages suffered by owners of adjoining property caused by the bursting of the water main.

In the case of *City of Chicago v. Seben*, 165 Ill., at page 379, the court says:

“By the terms of the City and Village Act, which has been adopted by the City of Chicago, the city council in cities has power to lay out, to establish, open, alter, widen, extend, grade, pave or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks and public grounds, and vacate the same; to regulate the openings therein for the laying of gas or water mains and pipes, and the building and repairing of sewers, tunnels and drains, and erecting gaslights; to construct and keep in repair culverts, drains, sewers, and cesspools, and to regulate the use thereof. (Rev. Stat. 1874, Chap. 24, Art. 5, Sec. 63.) The city, being thus required by law not only to construct but to keep in repair its culverts, drains, sewers and cesspools, is liable in damages for a neglect to perform said duties. It has always been the doctrine of this court, that, while the legal obligation of the city to construct gutters and grade and pave streets is one voluntarily assumed, yet, that when the city constructs these improvements for the benefit of the public, it then becomes the duty of the city to see that they are kept in repair. (*City of Alton v. Hope*, 68 Ill. 167; *City of Chicago v. Gallagher*, 44 *id.* 295; *Nevins v. City of Peoria*, 41 *id.* 502; *City of Joliet v. Verley*, 35 *id.* 58; *Roberts v. City of Chicago*, 26 *id.* 249; *City of Bloomington v. Bay*, 42 *id.* 503; *City of Lacon v. Page*, 48 *id.* 499; *Browning v. City of Springfield*, 17 *id.* 143.)”

In *City of Chicago v. Norton Milling Co.*, 97 Ill. App. 656, the court say:

“If the contract of appellant with appellee is void and of no effect, then, the city in swinging the bridge over the premises of appellee, has been for some eight years a trespasser, and if it did the work in a negligent manner, it is liable for the consequences of its negligence.

* * * * *

“A municipal corporation in planning a public work acts judicially, and proceeding in good faith, is not liable for errors of judgment; while in constructing public works it acts ministerially, and is bound to see that the work is done in a reasonably safe and skillful manner.”

We return all documents herewith.

Respectfully submitted,

EDWARD H. WRIGHT,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Validity of Proposed Zoning Laws.

June 30, 1916.

HON. ALEX. A. McCORMICK, EDWARD J. WERNER and EARL
J. WALKER, Aldermen.

Gentlemen:

On June 22nd, you referred to the corporation counsel a bill for the protection of residential districts, copy of which is attached to this letter, and requested an analysis of the matter contained in said bill.

The bill originated in the City Council of the City of Chicago and was discussed very thoroughly by various committees of the City Council and it was finally drafted and recommended to the General Assembly for passage on March 10, 1913.

The bill was accordingly introduced in the Legislature, 1913 session, and duly passed by both houses of the Legislature and vetoed by Governor Dunne for the reasons set forth in the opinion of the attorney general dated June 26, 1913, copy of which veto message and the opinion of the attorney general we attach hereto.

To analyze the bill in detail, we call attention to the fact that the bill is an act to amend Section 1 of Article V of The Cities and Villages Act, viz., the act granting powers to the City Council, and the purpose of the bill is to extend the power of the City Council.

In the fiftieth paragraph, which is the first amendment, the words:

"and to direct the location thereof"

are added, referring to the regulation of the sale of meats, poultry, fish and like provisions.

The second amendment occurs in the fifty-eighth paragraph in which are also added the words:

"and direct the location thereof"

referring to places of amusement.

The next amendment occurs in the eighty-second paragraph, which paragraph, as amended by this proposed bill, reads as follows:

"Eighty-second. To direct the location and regulate the use and construction of breweries, distilleries, livery, boarding or sale stables, blacksmith shops, foundries, machine shops, garages, *hangars*, laundries, bathing beaches, *planing mills, flour mills, box factories, lead factories, steel factories, iron factories, ice plants, either for the manufacturing or storing of ice, factories or other manufacturing establishments using machinery, or emitting offensive or noxious fumes, odors or noises, and storage warehouses* within the limits of the city or village."

The amended portions are shown by the italics.

The ninety-third paragraph is amended to read as follows:

"Ninety-third. To regulate, *direct the location of, and prohibit the keeping of, any lumber or coal yard, and the placing or piling or selling any lumber, timber, wood, coal or other combustible material, within the limits of the city or village.*"

and the amended portion is shown by the italics.

A new paragraph, known as Ninety-third "A" is added, which is as follows:

"Ninety-third "A." *To regulate, direct the location of and prohibit the placing, keeping, piling or storing of building or other material, junk or noxious matter, upon vacant property, and to regulate the use of such property, within the limits of the city or village.*"

The above paragraphs, five in number, which are amended, are in no way referred to in the opinion of the attorney general. They simply extend the power of the City Council along the line of enabling the City Council to regu-

late matters which are clearly within the police powers of the city and the state, and are powers which are needed in order to enable the city to properly regulate the industries referred to in the several paragraphs.

Paragraph 82nd "A", a new paragraph, reads as follows:

"Eighty-second 'A'. To establish and create exclusively residential districts, to prohibit the erection therein of buildings other than residences and the usual outbuildings appurtenant to residences, to prescribe the general character of residence buildings to be erected in such districts, and to prohibit the carrying on of any business in such districts, except upon the consent of all or any specified major fraction of the owners of lands therein, measured by street frontage, within the limits of the city or village."

Paragraph 82nd "B" is a new paragraph and reads as follows:

"Eighty-second 'B'. To direct the location and regulate the construction and maintenance of factories, manufacturing and business establishments and stores, in residence districts in which a majority of the street frontage is used exclusively for residence purposes."

Paragraph 82nd "A" is the one which is attacked by the attorney general as being unconstitutional for the reason that it is not a regulation which has anything to do with the health and safety of the public. The attorney general says:

"This power must be justified, if at all, upon the ground of a police regulation. The owner of private property may keep and use it as he may wish, free from interference on the part of the municipality, provided that, in so doing, he does not create and maintain a nuisance or cause inconvenience, damage or harm to others, and does not interfere with the health and safety of the public."

While this ruling may be technically correct if we adopt the strict technicalities of the common law, still the subject of the scope of the police powers has been and is today undergoing a rapid development in order to meet new conditions

as they arise. We respectfully submit that the time is coming when the court of last resort will recognize the right under the police power to regulate the use of property and not merely limit the right of the city or state to prevent the use of property because it creates a nuisance, but that the city may regulate the kind of buildings that are to be constructed within a certain district. In this connection, we call to your attention the decision of the Supreme Court of the United States delivered December 30, 1915, in the recent case of *Hadacheck v. Sebastian*, in which a municipal ordinance prohibiting brickmaking within a certain designated area was held to be a valid enactment under the police power. Although at the time the ordinance was passed there was an extensive brick yard existing within the prohibited territory, it was held that the prohibiting of the brick yard was not a taking of property without due process of law. The Supreme Court says, in 36 Supreme Court Rep., page 145:

“A vested interest cannot be asserted against it because of conditions once obtaining. *Chicago & A. R. Co. v. Iranbarger*, 238 U. S. 67, 78, 59 L. Ed. 1204, 1211, 35 Sup. Ct. Rep. 678. To so hold would preclude development and fix a city forever in its primitive conditions. There must be progress, and if in its march private interests are in the way, they must yield to the good of the community. The logical result of petitioner's contention would seem to be that a city could not be formed or enlarged against the resistance of an occupant of the ground, and that if it grows at all it can only grow as the environment of the occupations that are usually banished to the perlieu.”

The court also cited with approval the case of *Reinman v. Little Rock*, 237 U. S. 171.

In conclusion, it is our opinion that the bill contains amendments in paragraphs 50, 58, 82, 93 and 93 “A” which are essential for the city to possess to meet the changing conditions, and against which the opinion of the attorney general is in no way in conflict, and that the bill should be re-introduced in the next session of the General Assembly with these amendments. We further recommend that, as to

the amendments contained in paragraph 82 "A" and 82 "B", a brief of authority should be prepared and presented to the attorney general to show him that the better idea which is now developing in reference to the powers of cities would justify paragraphs 82 "A" and 82 "B" as a proper and legitimate exercise of the police power, and that if he could be prevailed upon to change his opinion, or if a new attorney general should be in office, possibly the more enlightened view as exemplified by the decision of the Supreme Court of the United States would cause him to change his opinion, the amendments might be inserted. If not, paragraphs 50, 55, 82, 93 and 93 "A" should be added and paragraphs 82 "A" and 82 "B" kept for a later amendment.

Respectfully submitted,

MORTON E. CRESSY,

WILBUR F. HARTMAN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Leasing of Space on Municipal Pier for Catering Privileges.

June 30, 1916.

HON. WM. HALE THOMPSON, Mayor of the City of Chicago.

Dear Sir:

We are in receipt of your request for an opinion as to the power of the Harbor Board to negotiate a lease for space on the Municipal Pier for the exclusive sale of food, non-alcoholic beverages, tobacco, confections, novelties, souvenirs, flowers, publications, etc., and generally to operate and conduct the catering concessions on the Municipal Pier, and as to the validity of an ordinance authorizing the Harbor Board to lease the same, passed by the City Council on June 19, 1916.

In reply we beg to advise you that the Municipal Pier has been constructed by virtue of an act of the General Assem-

bly of the State of Illinois, approved June 23, 1913, and in force and effect July 1, 1913, and in order to determine the authority of any one to enter into any contract of any kind in connection with said Municipal Pier, it is necessary for us to construe the act of the General Assembly authorizing the construction of the same.

The title of said act is as follows:

"AN ACT to enlarge the power of cities and villages in relation to harbors, canals, slips, wharves, docks, levees, piers, quay walls, breakwaters and all harbor structures, facilities, connections, improvements and utilities constructed or operated in connection therewith and for the purpose of carrying out such power to authorize the acquisition and condemnation of property and to authorize the use, occupation, recovery and acquisition of artificially made or reclaimed lands of the state and the reclamation and acquisition of the submerged lands of the state, and to repeal an act entitled, 'An act to enlarge the power of cities in relation to harbors, canals, wharves, docks, piers, slips and other harbor structures, facilities, improvements and utilities constructed or operated in connection therewith, to authorize the acquisition and condemnation of property and the use, occupation, reclamation and acquisition of the submerged lands of the state in carrying out such power, and to repeal all acts or parts of acts in conflict therewith,' approved June 10, 1911, and to repeal all other acts or parts of acts in conflict therewith."

Section 1 of the said act provides as follows:

"SECTION 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly: That every city and village in this state shall have the right, power and authority, and such right, power and authority are hereby granted to acquire, own, construct, maintain and operate anywhere within the jurisdiction or limits of the city or village, or in, over and upon any public waters bordering thereon, harbors, canals, slips, wharves, docks, levees, piers, quay walls, breakwaters and all appropriate harbor structures, facilities, connections and improvements, and in connection therewith to acquire, own, construct, maintain and operate such elevators, vaults and warehouses (including cold storage warehouses), as may be necessary adjuncts or incidental

to transportation and railroad terminals, and to acquire, own, construct, maintain and operate all other necessary or appropriate terminal facilities."

Section 3 of said act provides:

"§ 3. Every such city and village shall have the power to lease portions of any of the utilities mentioned in Section 1 of this act, for a period not longer than twenty (20) years on such terms and conditions as shall be prescribed by ordinance, and to fix and regulate the rates and charges for the use of such utilities, whether owned and operated by such city or village, or are operated by persons or corporations who are tenants of such city or village or are constructed, owned and operated by any public or municipal corporation as hereinafter provided: *Provided, however*, that except as to railroad facilities at least one-third of the capacity of each such utility shall not be leased for a period to exceed one year and that at least one-half of said one-third shall at all times be reserved by such city or village for general public use, and that not to exceed fifty per cent in capacity of the remaining two-thirds capacity of each such utility shall be leased to any one person or corporation: *Provided, further*, however, that no leases authorized under this act shall contain conditions which shall admit of any unjust, undue or unreasonable preference or discrimination between lessees."

From reading the above two sections quoted and the entire act in connection therewith, and applying the fundamental rules governing the construction of statutes in order to determine and ascertain the intent of the General Assembly, we beg to advise you that it clearly appears from the said act that the Legislature, in passing the same, intended to confer upon cities and villages the power to construct a pier for the purpose of enlarging the harbor facilities of the City of Chicago, so as to enable it to afford greater terminal facilities in connection with lake commerce, and for this purpose and this purpose alone, the City of Chicago was granted authority to construct, maintain and operate the pier in question.

Section 1 of the ordinance under consideration provides as follows:

"Section 1. That the Harbor Board be and it is hereby authorized and directed to enter into a lease, without advertising, with John Z. Vogelsang Co., a corporation to be organized, for lease of space on the Municipal Pier for the exclusive sale of food, non-alcoholic beverages, tobacco, confections, novelties, souvenirs, flowers, publications, etc., in such locations and in such manner as may be directed by the Harbor Board, for a period of ninety (90) days from and after the passage of this ordinance, in accordance with specifications on file with the Harbor Board, at a rental of eighteen (18) per cent of the gross receipts derived from the sale of the commodities herein authorized; said John Z. Vogelsang Co. to file its bond in the penal sum of twenty-five thousand dollars (\$25,000) with sureties to be approved by the Harbor Board to indemnify the City of Chicago and guarantee the fulfillment of the conditions provided by said lease; said lease and bond to be drawn in a manner and form satisfactory to the Corporation Counsel of the City of Chicago."

The ordinance is vague and indefinite in its definition as to the amount of space that shall be leased to the concessionaire therein.

The ordinance provides that the location and the space to be occupied by the concessionaire shall be determined by the Harbor Board and this same provision is contained in the specifications on which bids were received for the leasing of this privilege.

We are of the opinion, that this provision in the ordinance is illegal and void for the reason that it is a delegation to the Harbor Board of the power expressly conferred by the General Assembly upon the City Council. Under this provision in the ordinance and in the specifications, the Harbor Board is permitted to designate the size of the space as well as its location. The City Council is the only body authorized by law to lease any space upon the Municipal Pier and when that power is conferred upon them, it is their duty to designate the amount of space in view of the clear provisions of Section 3 of the act regulating the amount of space which can be leased to any one person or corporation.

We beg leave to advise you that the ordinance in ques-

tion and the specifications upon which bids were received for the purpose of awarding the contract referred to in the ordinance were not prepared by the corporation counsel's office, but it is quite clear to us from the phraseology contained in both documents that the Harbor Board appears to be losing sight of the principal purpose for which the Municipal Pier was constructed and that instead of maintaining it as a harbor facility to promote the commercial interests of the City of Chicago they are, by ordinances and contracts of this kind perhaps unwittingly diverting it into an amusement feature or recreation resort.

The language used in the act of the General Assembly authorizing its construction, gives no authority to any one to do so, and it is clearly beyond the power of the City Council to divert the Municipal Pier into an amusement park or a place to be maintained as a pleasure resort.

The ordinance in question cannot be construed as intending to aid in any way to induce persons to use the pier in question for commercial purposes. It clearly intends to authorize and confer power upon the concessionaire to conduct the concession authorized to be awarded him for the purpose of promoting the recreation features of the pier and inducing pleasure seekers to visit it. It was never intended by the General Assembly to confer power upon the City Council to do so.

In this connection we might add here that the Federal government issued a permit permitting the construction of the Municipal Pier only after the officials of the City of Chicago had assured the Federal government that the pier was to be used primarily, after construction, as a commercial project and only incidentally as a recreation resort. An ordinance authorizing a contract such as the one under consideration, might be construed by the Federal officials as an attempt on the part of the City Council to maintain the pier primarily as a recreation resort and only incidentally as a commercial one, and if the Federal officials should reach that conclusion, the City of Chicago might be placed in a very embarrassing position and the permit issued by the Federal government

permitting its construction and maintenance might be revoked. This point is one that should receive the careful attention of the City Council.

We also desire to call to your attention the fact that there is now pending before Congress a bill appropriating over \$700,000 for the purpose of building a breakwater to afford protection to the owners of vessels desiring to avail themselves of the use of the said pier as a commercial facility, and any legislation on the part of the City Council that would have a tendency to cause the Federal officials to feel that the City of Chicago was inclined to divert this pier from a commercial project into an amusement resort might result in the failure of the government to appropriate the money to build the breakwater.

From a careful examination of the statutes authorizing the construction of the Municipal Pier, it is very clear to us that the City Council has no right to authorize the city to enter into any contract that will fundamentally result in establishing an amusement park or pleasure resort on the Municipal Pier.

The specifications upon which bids were received for the leasing of the concession in question, and the specifications upon which the contract in question is to be awarded, contain the following provision:

“The concessionaire shall at all times be subjected to and strictly comply with all the rules and regulations general and special which shall, from time to time, be prescribed by the Harbor Board.”

We submit that the foregoing provision is susceptible to legal objection on the ground that the power is assumed by the Harbor Board to perform the functions, the exercise of which have a serious bearing upon the legal rights of the concessionaire by virtue of such lease, and which functions can only be exercised by the City Council, and if exercised by the Harbor Board might result in invalidating the contract and releasing the concessionaire from liability thereunder.

The general question as to the power of the Harbor Board to exercise functions of this character is open to serious

legal objections. The Harbor Board was created by an ordinance of the City Council, passed on January 19, 1916, and the ordinance appears on pages 2953 and 2954 of the Journal of the Proceedings of the City Council of said date. Section 1 of the said ordinance provides as follows:

“Section 1. HARBOR BOARD CREATED.) That there is hereby established an executive board of the municipal government of the city which shall be known as the Harbor Board. The following officers, namely, the commissioner of public works, the city comptroller, the city engineer, the harbor master, the superintendent of the Bureau of Compensation, the chairman of the Council Committee on Harbors, Wharves and Bridges and the chairman of the Council Committee on Compensation shall be *ex officio* members of and shall constitute said board and the duties of the member of said Harbor Board shall be merely in addition to the duties of their present offices, respectively. No member of said board shall receive any compensation by reason of his membership upon the same. The commissioner of public works shall be chairman of the board.”

Section 2 of the ordinance creating the Harbor Board provides in part as follows:

“Said board shall have the management and control of all matters and things, except as otherwise conferred by law upon the City Council, pertaining to the Municipal Pier in Harbor District No. 1, and pertaining to all harbor utilities and appurtenances when completed, or when the same are ready for use and occupation.
* * *”

Section 1 of the act authorizing the city to construct the Municipal Pier provides that the city—

“shall have the right, power and authority to acquire, own, construct, maintain and operate anywhere within the jurisdiction or limits of the city or village, or in, over or upon any public waters bordering thereon, * * * and in connection therewith to acquire, own, construct, maintain and operate such elevators, vaults and warehouses as may be necessary adjuncts or incidental to transportation and railroad terminals and to acquire, own, construct, maintain and operate all other necessary or appropriate terminal facilities.”

The following paragraphs of the Cities and Villages Act confer the following powers upon the City Council:

“Thirtieth. To deepen, widen, dock, cover, wall, alter or change channel of water course.

“Thirty-first. To construct and keep in repair canals and slips for the accommodation of commerce.

“Thirty-second. To erect and keep in repair public landing places, wharves, docks and levees.

“Thirty-third. To regulate and control the use of public and private landing places, wharves, docks and levees.

“Thirty-fourth. To control and regulate the anchorage, moorage and landing of all water craft and their cargoes within the jurisdiction of the corporation.

“Thirty-fifth. To license, regulate and prohibit wharf-boats, tugs and other boats used about the harbor, or within such jurisdiction.

“Thirty-sixth. To fix the rate of wharfage and dockage.

“Thirty-seventh. To collect wharfage and dockage from all boats, rafts or other craft landing at or using any public landing place, wharf, dock or levee within the limits of the corporation.

“Thirty-eighth. To make regulations in regard to use of harbors, towing of vessels, opening and passing of bridges.

“Thirty-ninth. To appoint harbor masters and define their duties.”

Such power as is vested in the City Council with regard to the construction, maintenance and operation of the Municipal Pier is conferred upon it by virtue of the special Harbor Act of 1913, together with the powers above enumerated, and nothing under the Cities and Villages Act or the Act of 1913, confers any powers upon the City Council to delegate any of its power or duties to any other person or body, It is an elementary principle of constitutional law that the government of cities and villages is divided into three separate and distinct branches, namely, judicial, legislative and executive, and that no branch of the government has any right, power or authority to usurp the functions or powers of any of the other branches. An ordinance creating a board and constituting the officers of that board partly executive

and partly legislative is an attempt to consolidate the executive and legislative branches of the municipal government, and is beyond the power of the City Council. An ordinance of such a character is absolutely void.

“The division by the Constitution of the powers of the government of the state into three departments, namely, legislative, executive and judicial, applies to municipalities which are state agents as well as to their principal, the state.” *People v. Olson*, 245 Ill. 288.

Assuming, for the sake of argument, that the City Council had the power to pass the ordinance in question, Section 1 of the ordinance is open to serious objections. The term “etc.” used in this section of the ordinance has been defined in the case of *Bagley v. Rose Hill Sugar Co.*, 35 S. W. Rep. 539—

“As used in an act of sale of property, describing the property sold by enumerating various articles and concluding with the term ‘etc.,’ the vendor does not intend that the description shall be regarded as complete and exhaustive and as exclusive of everything not expressly mentioned, but, on the contrary, that other articles exist, which for brevity are not mentioned.”

In the case of *Doty v. The American Telephone & Telegraph Company*, 130 S. W. Rep. 1053, the Supreme Court of Tennessee held that the words, “*et cetera*” mean “and other things.”

The specifications upon which the bid for this concession was obtained contain the same phraseology in describing the articles permitted to be sold as does the ordinance, and we are of the opinion that the use of such language in such an important contract as this is exceedingly dangerous and might result in the concessionaire claiming the right to sell any number or kind of other articles on the premises leased to him, which, in the face of the foregoing judicial definition of the term “etc.,” would estop the City of Chicago from preventing such action on the part of the concessionaire.

The use of language of so vague and general a character as this in legal documents, is decidedly dangerous and should never be permitted to be used, as it has a tendency to raise

serious legal complications should any misunderstanding arise as to the proper interpretation of the language used in the ordinance and contract. The ordinance further provides that the rental to be charged shall be eighteen per cent (18%) of the gross receipts derived from the sale of commodities therein authorized.

This raises another very serious objection to permitting the ordinance in question to become a law. If any misunderstanding should occur between the parties as to the amount of revenue required to be paid to the City of Chicago, it may be that the courts would construe this provision of the ordinance as limiting the right of the city to receive a percentage of the gross receipts upon the sale only of the articles specifically named therein, and those sold by the concessionaire under the term "etc.," would not be included in the articles that the city would be entitled to receive compensation for the sale of.

It may be suggested that there is danger that this proposed agreement may be construed to amount to a partnership agreement. This danger was apparently in the minds of whoever prepared the contract since the contract contains a provision to the effect it shall not be construed as a partnership agreement. If in fact the agreement does create a partnership it is not safe to assume that saying that it does not will change its character.

The serious consequences that might follow from the agreement being so construed are too obvious to be specified.

Again, there arises a grave question as to the mutuality of this contract, especially in view of the uncertainty as to the space that may be occupied. Of course, it would be unwise to enter into a contract from which the concessionaire might escape on the ground of want of mutuality.

Respectfully submitted,

JAMES W. BREEN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

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